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REPORTS

OF

Cases on Appeal from Scotland,

DECIDED

In the House of Peers.

VOLUME THE FIRST,

CONTAINING THE PERIOD FROM THE UNION IN 1707,

TO THE

COMMENCEMENT OF THE REIGN OF GEORGE II.

By DAVID ROBERTSON,

OF THE HON. SOCIETY OF THE MIDDLE TEMPLE.

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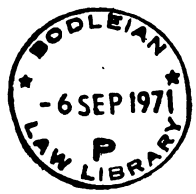
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TO

THE RIGHT HONOURABLE

JOHN LORD ELDON,

LORD HIGH CHANCELLOR OF GREAT BRITAIN,

THESE CASES

ARE INSCRIBED,

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AS A TESTIMONY OF HIGH RESPECT,

BY

HIS LORDSHIP'S

MOST HUMBLE, AND

MOST OBEDIENT SERVANT,

DAVID ROBERTSON.

PREFACE.

THE importance and utility of Collections of judicial Decisions are universally acknowledged.

In Scotland the Decisions of the Superior Courts of Common Law have received a proper degree of attention. Collections of Cases decided in the present Court of Session began to be formed at an early period after its institution, and these have been continued, though with various interruptions, till the present day. In matters of Criminal Law, the questions agitated in the Court of Justiciary have also in part been laid before the public.

Before the Union with England, little attention appears to have been paid in Scotland to the Judgments of their Parliament in Cases of Appeal; and since that period the decisions of the British House of Peers, in questions from Scotland, have been too much neglected.

In early times the Parliament of Scotland appears to have exercised an original Jurisdiction in civil causes *: Whether or not there existed, in those times, an Appeal to the Parliament from the decisions of the other Courts then existing, is more obscure.—But a remedy of Complaint to the Parliament against those who exercised local jurisdiction appears to have been then known and practised.

* Rymer, vol. i. par. 3. pp. 117. 120. Hague edit.

Soon after the return of James I. from his captivity in England, a remedy was applied to the many inconveniences, which muſt have reſulted from the original Juriſdiction of the Parliament in Civil Cauſes. It was directed by an Act of the Legiſlature * that Bills of Complaint ſhould not be determined by the Parliament, but by the ordinary Judges of the Courts then in exiſtence, the Juſtice, Chamberlain, Sheriffs, Baillies of Boroughs and Baronies, or the Spiritual Judges, with all of whom, it is to be preſumed, that the Parliament before this period had a concurrent Juriſdiction. If theſe Judges refuſed to execute the Law *evenlie*, recourſe might be had to the King, who was rigorouſly to puniſh the offenders as an example to others.

In the following year, under the auſpices of the ſame ſagacious Prince, the Court, termed *The Seſſion*, was erected †, for the purpoſe of trying all queſtions that might be determined before the *King in his Council*. The Members of this Court, ſelected from the three Eſtates of Parliament, were to examine, conclude, and finally determine all queſtions brought before them. The Court of the *King in his Council*, mentioned in this Act of Parliament, appears to have had concurrent Juriſdiction with the Parliament, and Judges Ordinary, in civil Cauſes; and it now retained a concurrent Juriſdiction with the Court then eſtabliſhed.

Afterwards the Parliament laid down certain regulations with regard to Appeals, or as they were then ſtiled *falſing of dooms*, and gave their authority to this ſpecies of legal remedy ‡. It was probably left ambiguous whether this falſing of dooms extended or not to the Judgments of *The Seſſion*. To remedy this ambiguity, in the following reign, among other regulations made with

* 1424. c. 45. † 1425. c. 65. ‡ 1429. c. 116.

regard

regard to the Adminiſtration of Juſtice, it was provided by the Legiſlature * that the Cauſes coming before this Court ſhould be *utterly* decided without any remedy of Appeal to the King, or to the Parliament. With regard to their Judgments therefore, no Appeal, or *falſing of doom*, was competent.

It is not neceſſary at preſent to examine minutely the different changes which ſubſequently took place in the Adminiſtration of Juſtice in Scotland, till the Supreme Civil Court was ſettled in its preſent form. In 1475, the Juriſdiction of *The Seſſion* appears to have been aboliſhed; and Parties were directed to purſue Juſtice, firſt before the Judges Ordinary; and a further remedy was given in the nature of an Appeal to the King and his Council †.

In 1503, a new Court, termed *The Daily Council*, was erected with the ſame powers which formerly belonged to *The Seſſion* ‡. This Court remained till the Eſtabliſhment of the preſent College of Juſtice; and the Legiſlature, when it eſtabliſhed this new Court §, declared that its ſentences ſhould have the ſame ſtrength, force, and effect, as the Decrees of the Lords of the Seſſion had, while that Court was in exiſtence.

In 1674, a violent conteſt aroſe between the Lords of Council and Seſſion, and certain Members of the Faculty of Advocates, with regard to the competency of an Appeal brought to Parliament from a Decree of the Court. A Cauſe by the Earl of Dumfermline againſt the Earl of Callender and his ſon, Lord Almond, had excited much atten-

* 1457. c. 62. † 1475. c. 62. and 1487. c. 105.
‡ 1503. c. 58.
§ In the common edition of the Statutes 1537. c. 36. In the edition known by the name of *The Black Acts*, 1532. c. 6.

tion, from what was conſidered a perſonal interference of the Duke of Lauderdale. Lord Almond, by the advice of Lockhart and Cuningham, Advocates then much eſteemed in their profeſſion, preſented an Appeal to Parliament againſt an Interlocutor pronounced in the Action. This matter was very warmly taken up by the Court; they declared that they found that no ſuch Appeal had ever before been given in in Writing; though in an Action between the Earls of Glencairn and Eglintoun in 1648, an Appeal had been made verbally, which had been acted on; and they ſtated as the ground of their opinion of the incompetency of an Appeal, that the Legiſlature had declared that no Appeal lay from the Judgments of *The Seſſion*, and that the ſentences of the Senators of the College of Juſtice ſhould have the ſame force and effect which had been given to thoſe of the former Court.

Pending the Diſcuſſions which aroſe upon this ſubject, another Appeal to Parliament was preſented in the name of Lord Aboyne. The Judges, conſidering this matter of ſufficient importance to require the interference of His Majeſty, in a letter to Charles II., complaining of the Appeals which had been preſented, ſtated that there appeared no veſtige on record of any ſuch Appeal ſince the Inſtitution of the College of Juſtice, or before that period.

His Majeſty took up this matter with increaſed warmth. In a letter to the Court he declared his diſſatisfaction with, and *abhorrence* of theſe Appeals, and directed that ſpecial care ſhould be taken to prevent them in future. He enjoined that no perſon connected with the College of Juſtice, nor any others, ſhould adviſe, or in word or writing ſtate any thing that expreſſed or imported the charging of the decrees of the Lords of Seſſion with injuſtice, either in the way of Appeals or otherwiſe. If the Advocates who had adviſed the Appeals which had been preſented refuſed to diſown them, he commanded

the

the Court to debar them from the exercise of their profession in time coming.

The Advocates however refused to disclaim the Appeals, or to take an Oath which the Court had arbitrarily tendered to them to that effect. Being suspended from the exercise of their profession, many other Members of the Faculty of Advocates, adhering to the opinions of their brethren, withdrew along with them from the Court. Under the sanction of the Crown the refractory Advocates were afterwards banished from Edinburgh. This quarrel between the Judges and the Bar was not adjusted till after a considerable lapse of time; but the Advocates at last submitted to the opinion of the Court, and upon making their individual submissions, were received again to the exercise of their profession *.

I have not discovered the grounds upon which the Advocates, in opposition to the Court, maintained their opinion. From the Acts of Parliament considerable doubts may be entertained, whether Appeals were then competent by Law. It appears, however, that the Appeal between the Earls of Glencairn and Eglintoun, was not the only one which had been presented to the Parliament since the Institution of the College of Justice. Another instance is mentioned in Balfour's Practicks in 1532 †, which seems to have passed without objection,

* Acts of Sederunt, 1674.—Preface to Forbes's Decisions, p. 17. Even in England, the appellate jurisdiction of the House of Peers was not yet settled: keen disputes on this subject, between the two Houses of Parliament, occurred in 1675. Among other resolutions passed by the Commons, one was, "That there lies no appeal to the Judicature of "the Lords in Parliament from Courts of Equity." *Lords and Commons Journals*, May and June 1675.

† Balfour's Practicks, p. 268. There appears to be no doubt that the date of the Institution of the College of Justice given in the Black Acts (1532) is more correct than that given in the common edition of the Statutes (1537). The authority of Balfour's Practicks coincides with that of the Black Acts upon this point.

and was conſidered as ſhewing the general competency of ſimilar Appeals.

Of the expediency of allowing the Judgments of the Court to be reviewed in Parliament, and of the arbitrary nature of the proceedings againſt the Advocates, there appears to have been a very general conviction in the Country. This became manifeſt at the Revolution, when the Convention of Eſtates declared the Baniſhment of the Advocates to have been illegal, and aſſerted it to be the right of every ſubject "to proteſt for remeid of Law "to the King and Parliament, againſt ſentences pro- "nounced by the Lords of Seſſion, providing the ſame "did not ſtop execution of thoſe ſentences *."

I obſerve that a diſtinction, which ſeems hardly intelligible at preſent, was made at this period between Appeals and the Proteſtations for remeid of Law, which had now received the ſanction of the Legiſlature. It is held by Lord Stair, that Appeals were ſtill incompetent, but it is admitted that Proteſtations for remeid of Law were ſometimes juſt and neceſſary. He ſeems ſtill to have looked with an unfavorable eye on the licence given to theſe Proteſtations. He conſidered that till the King and Eſtates of Parliament ſhould determine in what caſes they might warrantably be uſed, and in what caſes (as he ſays) they ought to be puniſhed, it was neceſſary to uſe caution, leſt the Lieges might enſnare themſelves, "and become liable to *puniſhment for murmuring* againſt the Lords †."

From the Revolution till the time of the Union, various inſtances appear of Proteſtations for remeid of Law to the Parliament of Scotland. Several of them are mentioned by the Collectors of the Deciſions of thoſe

* Act of Convention, 1689. c. 13.

† B. 4. tit. 1. § 56, &c. Some obſcurity alſo ſeems to attend what his Lordſhip ſays of the features of thoſe caſes which were fit to be brought before Parliament for review.

times;

times; and in ſome caſes the Judgments of the Parliament are incidentally ſtated where the parties had occaſion to return to the Court of Seſſion *. But thoſe Judgments of the Parliament never were ſpecially collected as Precedents, and are now perhaps to be conſigned to oblivion. Indeed there is reaſon to ſuppoſe from the little authority given to private Acts of Parliament, that the judgments of the Parliament of Scotland in matters of Appeal, were not thought to be of much weight, further than to the parties intereſted. A learned Author obſerves, that the "Parliaments were at leaſt far better "conſtituted for ſettling general laws than for diſcuſſing "the private rights of Parties †."

It was a point much agitated previous to the Union, in what manner Appeals from Scotland ſhould be afterwards diſcuſſed; and a conſiderable degree of anxiety prevailed for the Laws and Cuſtoms of that Country, by allowing the Appeals to be carried to the Parliament of Great Britain ‡. The fears however that were then entertained of an inundation of Engliſh Law through this channel have not been verified.

Previous to the Union, the Claim of Right had regulated the effect of a Proteſtation for remeid of Law, in as much as it had provided that this Proteſtation ſhould not ſtop execution of the ſentence of the Court below. But the Houſe of Lords ſoon after the Union made an order with regard to Appeals from Scotland, which materially altered this enactment of the Scottiſh Legiſlature. It was declared, that after an order made to anſwer an Appeal, and the due intimation of ſuch order to the Reſpondent, the ſentence or decree appealed againſt from

* Stair and Fountainhall's Deciſions, *paſſim*.

† Dirleton's Doubts, and Stewart's Anſwers, *voc.* Parliament, p. 218.

‡ Defoe's Hiſtory—debates on this point.

ſuch

ſuch time ought not to be carried into execution by any Proceſs whatever. It is not to be diſcovered from the Journals, whether the Houſe, when this order was made, had under their conſideration that article of the claim of right which had regulated this matter in Scotland *. This order, though not particularly mentioned by our Text Writers, was probably the foundation of what they ſtate to be the Law with regard to the effect of an Appeal to the Houſe of Lords †.

Several inſtances of reverſal having occurred, Appeals became ſo frequent, at an early period after the Union, that Lord Fountainhall complains that "they increaſed "every year, to the great impoveriſhing and detriment "of the Nation ‡."

They were ſtill in Scotland ſtiled *Proteſtations for remeid* of Law. In Appeals brought after the Union, the form previouſly uſed in Appeals from Courts of Equity in England had apparently been adopted: But the old

* All that is known with regard to the order, or the occaſion of its having been made, appears from an entry in the Journals of date the 19th of April 1709, of the following tenor: "The Houſe having "this day heard Counſel upon the Petition of Mr. George Mackenzie, "ſon to George Mackenzie, Grantee from Her Majeſty, in a Decree "of Exchequer of North Britain, pronounced againſt Sir Alexander "Brand, relating to his Appeal in this Houſe, as alſo Counſel on "the Petition of Sir Alexander Brand.

"The following order was made, viz.

"It is ordered by the Lords Spiritual and Temporal in Parliament aſſembled, 'That after an Appeal ſhall be received by this "Houſe from any ſentence or decree given or pronounced in any "Court in Scotland, and an order made by this Houſe for the Reſpondent to answer the ſaid Appeal, and notice of ſuch order duly "ſerved on the Reſpondent, the ſentence or decree ſo appealed againſt "from ſuch time, ought not to be carried into execution by any proceſs whatever.'"

† Bankton, B. 4. tit. 1. § 61. Erſkine, B. 4. tit. 3. § 2.

‡ Vol. 2. p. 734.

form

form of taking a Proteſt againſt the deciſion of the Court, and declaring the grounds of Appeal by an Inſtrument under the hand of a Notary Publick was continued for a conſiderable period after the Union. When the effect of an order of the Houſe of Lords upon a Petition of Appeal came to be generally underſtood, the *Proteſtations for remeid of Law* were gradually diſcontinued, and for many years have been wholly left off *.

Queſtions decided on Appeal, after the time of the Union, though they excited attention, do not ſeem at firſt to have been more regarded as precedents, than the Queſtions appealed in the Parliament of Scotland had before been. The great weight and authority, however, of the Judgments of the Britiſh Houſe of Lords have been long received and acknowledged; but, while their deciſions in particular inſtances have excited much attention, no collection of them has hitherto been given to the publick.

Various reaſons might be aſſigned for the neglect of this valuable body of deciſions. At firſt, the jealouſy that was entertained by the Courts and by the Practitioners of the Law of Scotland, of the new appellate Juriſdiction, may be ſuppoſed to have prevented the deciſions from being collected and treated with the reſpect which they deſerved. The country, too, was much agitated with political queſtions of great magnitude, which ſoon after kindled a rebellion and civil war. In theſe turbulent periods, it is not probable that many of the

* Proceedings in ſuch Caſes before the Parliament were regulated by 1695, c. 2. The form of a Proteſtation for remeid of Law may be ſeen in *The Art and Office of a Notary*, p. 302.

Appeal

Appeal Caſes, which were printed for the Houſe
Lords, found their way to Scotland; and in after time
more adapted for ſuch purſuits, the difficulty of pr
curing a complete Collection of theſe Caſes may ha
been deemed to be an unſurmountable obſtacle to t
making a Report of them.

The Collections of printed Appeal Caſes, which go
far back as the Union, muſt neceſſarily be in the han
of but a few individuals; and probably, there is no i
ſtance where ſuch a Collection is complete. For want
proper arrangement, theſe Caſes muſt alſo be of litt
uſe to the poſſeſſors of them; and the expence of pr
curing them is conſiderable. Having had acceſs to a ve
full Collection of Appeal Caſes *, I have for ſome yea
turned my attention to the practicability of giving to t
Publick thoſe Queſtions, relative to the Law of Scotlan
which have been decided in the laſt reſort. Having ex
mined the Journals of the Houſe of Lords to find wh
Appeals had come to a deciſion, and having inſpect
the Collections of Caſes in the Libraries of ſeve
publick bodies and individuals, it appeared that th
Appeal Caſes have been preſerved for the greateſt pa
and they have been hitherto found in all but a very f
inſtances.

In the period to which my attention has hitherto be
chiefly directed †, ſeveral reaſons have appeared tendi
to render ſuch a work deſirable. Many Caſes have be
appealed which are not to be found among the deciſic
of the Court of Seſſion hitherto publiſhed. In ſunc
inſtances, alſo, where the Judgments of the Court
Seſſion have been reverſed in Parliament, the original

* Belonging to John Spottiſwoode, Eſq.

† From the Union till the commencement of the reign
George II.

ciſions ſtill remain as precedents (and theſe in ſome queſtions of much moment) in the Collections of decided Caſes, in the Dictionary of Deciſions, and in the works of the Law Writers of authority. The inſtances where ſuch reverſals are properly ſtated, in this period, are ſo few as only to form exceptions to the general practice. Some Caſes alſo have occurred, where it appears from the Dictionary and the books of authority, that the Judgments of the Court below had been given in a certain way; whereas in fact ſuch Judgments were merely interlocutory, and were afterwards altered by the Court, and the latter Judgments affirmed upon Appeal.

In the Queſtions here collected, there is a degree of certainty that the whole of the Matter at iſſue is before the Reader; but in the Collections of the Deciſions of the Court of Seſſion, during the period before-mentioned, the Judgments reported are often Interlocutors pronounced upon ſeparate points of a Cauſe, the reſt of which is ſometimes not to be found in ſuch Collections. In general in the printed Deciſions of the Court of Seſſion, during that period, there is little certainty, that the Judgment reported, was either the final Deciſion in the Cauſe, or that ſuch Judgment was not brought before a Court of Appeal.

By mentioning theſe particulars, it is not intended to bring into queſtion the accuracy or authority of Lord Kaimes, and other learned men, whoſe labours have tended ſo much to benefit the Science of the Law of Scotland. They ſhew, however, that this branch of legal Deciſions, ſurely a moſt important one, has not been ſufficiently attended to by theſe writers.

After a good deal of conſideration as to the ſhape in which the Caſes on Appeal ſhould be given, it has been reſolved

reſolved to adopt the following arrangement: To give Statement of the circumſtances involving each Caſe, an of the proceedings leading to the Interlocutors appeale from; to give theſe Interlocutors, with their dates, a correctly as they can be learned from the original Caſes * and to aſcertain from the Journals of the Houſe of Lord where this can be done, what Interlocutors were appeale from in every cauſe, with their dates: if the Caſe de pends upon Matter of Argument in Law, or of Con ſtruction, to give the heads of ſuch Argument: wher it depends upon diſputed Facts, it has been conſidere unneceſſary, in moſt inſtances, to detail theſe diſpute Facts; the Judgment is then given as ſtated in the Jour nals. This arrangement has only been varied, wher reaſons appeared requiring ſuch alteration. On the mar gin are given References to the printed Collections o Deciſions, in which particular Caſes are reported, wit a ſhort Abſtract of each Caſe. At the end of eac Number, the Names of the Counſel, which appe at the original Caſes, are ſtated, and ſuch other obſerva tions are added as have occurred upon that particular Caſ

A good many Caſes in the preſent Volume relate t queſtions ariſing out of Forfeitures incurred for High Tre ſon. A learned Reporter of Deciſions in Scotland men tions † that he had omitted almoſt all the Caſes of Treaſon in the hope (among other reaſons) that there woul not at leaſt for ages be occaſion to conſult them. I hav ventured to think a different courſe more expedient wit regard to caſes of this nature. Many of theſe Caſes ar curious in themſelves, and it is not in their direct appl

* In the Interlocutors, the terms *Appellant* and *Reſpondent* ha been generally uſed, more eaſily to mark the Parties. This is com monly done in the early Appeal Caſes.

† Preface to Maclaurin's Criminal Caſes, p. 4.

catic

cation only that they may be uſeful. The courſe of events has happily done away the grounds of delicacy upon ſuch ſubjects.

At one time it was intended to have given theſe Reports in a more detailed form: but upon further Reflection this has been deemed to be inexpedient. During the period to which attention has hitherto been chiefly directed, few Caſes have occurred from which ſome important deduction in Law or in Practice may not be formed.

It may be objected that the *ratio decidendi* muſt often be unknown or obſcure in theſe Reports; but the ſame objection may be made to moſt of the Reports of Deciſions in Scotland during this period. The Interlocutors appealed from frequently contain information as to the ground of Deciſion; and it is the preſent object to ſtate with diſtinctneſs how the Court of Appeal has dealt with the Interlocutors pronounced by the inferior Courts under certain circumſtances. This has now been unknown for more than a century; and it is conceived to be an object of conſiderable Importance to obtain ſo much, where probably little more can now be obtained.

SACKVILLE-STREET,
November 1807.

RE-

In page 61. *for* No. 9. *read* No. 11.

75. *for* No. 5. *read* No. 6.

220. *for* arguments, *read* agreements.

324. *for* the fiar, *read* the father.

337. *for* vaſſal, *read* ſuperior.

REPORTS OF CASES

ON APPEAL FROM SCOTLAND.

Case 1.

Sir James Gray, Baronet, - - *Appellant*;
James Duke of Hamilton, Charles Earl of Selkirk, and Captain Alexander Gavin, *Reſpondents*.

Fountainhall, 22d and 31ſt July 1708.

10th *March* 1708-9.

Foreign Deeds.—An aſſignment of a bond, (both being executed in England and in the Engliſh form) intimated by letter only, is preferable to a poſterior arreſtment.

The judgment, finding that the law of Scotland ſhould regulate this caſe, is reverſed.

Holograph letters.—The Court having refuſed to allow holograph letters to be equivalent to an intimation—judgment alſo reverſed.

IN 1703 the Duke of Hamilton having borrowed 1000*l.* from Captain Gavin at London, he there granted Gavin his bond in the Engliſh form for re-payment of that ſum with intereſt.

Gavin being indebted to Sir James Gray, the appellant, who was then alſo in London, he in July 1704, aſſigned the ſaid bond to Sir James; and the aſſignment was executed in England, and in the Engliſh form. No formal intimation of this aſſignment was made to the Duke of Hamilton according to the mode practiſed in Scotland, but Sir James, on the 7th of September 1705, gave the duke notice of it by letter, and he received an anſwer from his grace, in his own hand-writing, bearing date the 22d of the ſame month, acknowledging that he had notice of the aſſignment, promiſing payment to Sir James of principal and intereſt, and deſiring not to be preſſed till he was in a condition to pay: and Sir James received another letter from the duke of a ſimilar nature, alſo written by his grace himſelf, and bearing date the 5th of April 1706.

The reſpondent, the Earl of Selkirk, brother of the Duke of Hamilton (*a*), to whom Captain Gavin was alſo indebted in a large

(*a*) They were both ſons of Lady Ann Hamilton and William Earl of Selkirk afterwards Duke of Hamilton.

ſum of money, having got notice of the duke's debt to Gavin, and the aſſignment thereof, on the 14th of June 1706, laid arreſtments in Scotland in the hands of his grace and Sir James Gray towards ſatisfaction of his own debt. But Sir James, notwithſtanding theſe arreſtments, on the 31ſt of March 1707, procured a new bond from the duke to himſelf corroborating the former, and for payment of the 1000*l.* by inſtalments; and he at ſame time granted the duke a counter obligation, that he would procure a decree of the court of ſeſſion for the duke's payment of the money to him, and to keep his grace harmleſs from the arreſtment. All the parties in theſe tranſactions were Scotſmen.

Sir James having brought an action before the court of ſeſſion againſt the Duke of Hamilton for payment of the money to him accordingly, the Earl of Selkirk appeared for his intereſt, inſiſting that his arreſtment was preferable to Sir James's aſſignment, which had not been legally intimated. Sir James contended, that the law of England, which did not require a formal intimation, ought to regulate this caſe; and, further, that the duke's letters were equivalent to an intimation.

After ſundry proceedings in this cauſe, the Lord Ordinary found, that the duke's letters were equivalent to an intimation, and that the dates thereof were prior to the earl's arreſtment, and therefore preferred Sir James Gray, and decerned.

But the reſpondent having brought the Lord Ordinary's judgment under review, the court by interlocutor on the 22d of July 1708, found "that Sir James Gray having made his election "to proſecute his action before a Scots judicature, had ſubmitted "it to the law of Scotland, which requires an aſſignment to "be intimated in a particular manner preſcribed as eſſential to "complete the right of the aſſignee, and makes all aſſignments "void where there is the leaſt variation from this form, and "that the duke's private letters could not ſupply the defect of "ſuch legal intimation, nor be admitted to invert the order of "preferring creditors eſtabliſhed by law, eſpecially in prejudice "of a third party acting by law, and under a legal aſſignment, "viz. an arreſtment, which being executed according to the "Scots law is equal to an aſſignment in writing, and therefore "decerned the Duke of Hamilton to pay the money to the Earl "of Selkirk, and aſſoilzied the duke from the proceſs at the "inſtance of Sir James Gray."

The appellant reclaimed, and prayed the court to grant him a commiſſion for proving the time of his having received the duke's letters: but on the 31ſt of July 1708, the court "refuſed to "grant the appellant a commiſſion as deſired in the petition, "adhered to their former interlocutor, and ordained the ſame to "be extracted."

Entered, 14 Dec. 1708.

The appeal was brought from "a ſentence or decree of the "Lords of Council and Seſſion on the behalf of Charles Earl "of Selkirk, and the affirmance thereof the 31ſt July 1708."

Heads of the Appellant's Argument.

The matters in queſtion having been tranſacted in England, and the bond and aſſignment being in the Engliſh form, the law of England, by which intimation of an aſſignment as done in this caſe by letter would be ſufficient, ought to rule this caſe. By the law of nations, bonds and other perſonal contracts may be ſued upon *ubique*, and are to be determined on according to the cuſtom of the place where they are entered into. It was ſo determined by the Houſe of Peers in the caſe of *Foubert* v. *Turſt*, 11th December 1703, and by the Court of Seſſion in the caſe of the *Maſter of Saltoun*, Stair, 5th July 1673.

It ought not to be preſumed that the duke's letters, objected to as not probative, would be antedated by a perſon of his grace's honour and quality, to defraud his own brother: if the Court of Seſſion had thought this poſſible, they ought to have allowed a proof of the time of receiving thoſe letters.

Heads of the Reſpondents' Argument.

By the law of Scotland an aſſignment ought to be intimated to the debtor, in the manner preſcribed by the act of the Scots parliament 1681, c. 5.; in default thereof the aſſignment is void againſt a third party; and an arreſtment uſed before making ſuch requiſite intimation, is equal by the law of Scotland to an aſſignment legally intimated.

After hearing counſel, *It is ordered and adjudged, that the ſentence or decree, and the affirmation thereof, complained of in the petition and appeal of Sir James Gray, be reverſed: and it is further ordered, that the* 1000l. *and intereſt ſecured by the ſaid bond be paid to Sir James Gray the appellant; and the ſaid James Duke of Hamilton is to pay to Sir James Gray the* 1000l., *and intereſt thereon due accordingly, and for ſo doing ſhall be and is hereby indemnified.* Judgment, 10 March 1708-9.

For Appellant,	*J. Jekyll.*	*Sim. Harcourt.*
For Reſpondents,	*John Pratt.*	*Dugal Stuart.*

The deciſion of the Court of Seſſion, here reverſed, is ſtated as an exiſting caſe in the Dictionary of Deciſions, vol. i. *Voce Foreign*, p. 318.; and vol. ii. *Voce Proof*, p. 258.; and in Erſkine, book 3. tit. 2. § 22. 42.

The caſe of *Foubert* and *Turſt*, referred to by the appellants, being on a point of general law, may be briefly ſtated. Foubert v. Turſt in the Houſe of Lords, 11 Dec. 1703.

By articles of marriage executed at Paris, between Foubert and his wife, it was covenanted that two-thirds of 1200 livres ſhould be ſettled as an eſtate to deſcend to the wife and her heirs, and that the goods of the huſband and wife *ſhould be in communion, and be diſtributed according to the cuſtom of Paris.* Theſe perſons,

being proteſtants, ſettled in England after the revocation of tl
edict of Nantes, where the wife died without iſſue.

Her repreſentatives filed a bill in the Court of Chancery
England againſt the huſband, claiming the two-thirds of tl
1200 livres ſettled upon the wife and her heirs, and alſo a moie
of the goods in communion according to the cuſtom of Pari
The Lord Keeper in Michaelmas term 1702 decreed, that the
two-thirds of 1200 livres ſhould be paid to the plaintiffs, but th
the huſband and wife having left France, and ſettled in Englan
their goods in communion were not to be diſtributed according
the cuſtom of Paris, notwithſtanding the covenant in the ma
riage articles. But the repreſentatives of the wife having broug
their appeal againſt the latter part of the decree, in regard to tl
diſtributions by the cuſtom of Paris, the ſame was reverſed l
the Houſe of Lords.

Laſhley v. Hog, in the Houſe of Lords, 16 July 1804.

In the important caſe of *Laſhley* v. *Hog* in the Houſe of Lord
in a ſpeech previous to the deciſion by Lord Chancellor Eldo
this caſe of Foubert and Turſt was ſtated; his lordſhip conſider
the reverſal as having been founded in the *contract*, and that if the
had been no contract, the law of England would have regulat
the rights of the huſband and wife, who were domiciliated
England, at the diſſolution of the marriage.

Caſe 2.

Fountainhall, 26 July 1706, 12 July 1709.

Roſe Muirhead, the Widow of James Muirhead the younger, of Bradiſholm, deceaſed, - *Appellant*;
James Muirhead of Bradiſholm, - - - *Reſponden*

14th *March* 1708-9.

Donatio non preſumitur.—A diſpoſition by a father to his ſon, (followed by ſaſine, which was not regiſtered) made to preſerve the eſtate from penalt of a teſt act, might be warrantably cancelled.
Qualified oath.—An oath received, though objected to as containing qualities.

THE late James Muirhead, the reſpondent's eldeſt ſon, in 169 married the appellant an Engliſhwoman at London; ar the parties in the preſent appeal ſeverally allege, that deceit w uſed with reſpect to the fortunes of the huſband and wife c that occaſion. In September 1700, three years after the marriag articles of agreement were entered into in the Engliſh forn whereby the huſband covenanted to ſettle lands in Scotland the annual value of 250*l.* for his wife's jointure; or to leave h at his death 2000*l.* perſonal eſtate, and 2000*l.* more to the iſſ of the marriage. He afterwards brought his wife to Scotlan where they both for ſome time reſided with the reſpondent.

But miſunderſtandings ariſing in the family, the ſon brougl an action before the Court of Seſſion againſt the reſpondent h father for exhibition of a diſpoſition of the lands of Bradiſholn which

which had been executed by the father in favour of the ſon, and of a ſaſine taken thereon; and for declaring the ſon's right to the eſtate in conſequence of theſe titles. Soon after the commencement of this action James Muirhead the younger died, leaving iſſue of the ſaid marriage a daughter, and the appellant his widow pregnant with a ſon, who died in a ſhort while after his birth.

About ſix months before the huſband died, he executed a holograph deed in the appellant's favour, and thereby "ſurrogated, "ſubſtituted, and appointed the appellant, and gave to her his "full right to all and every thing he had or could have had if "living, as fully and amply in all manner of reſpects as if every "thing were there ſet down at large;" and he appointed the appellant his ſole executrix.

After her huſband's death, the appellant re-commenced the action of exhibition and declarator againſt the reſpondent, to compel him to produce and deliver uncancelled the reſpondent's marriage ſettlement, whereby (the appellant contended) her huſband was to ſucceed his father in his eſtate; and alſo the ſaid diſpoſition and ſaſine, which (ſhe ſtated) were made in implement of ſuch marriage ſettlement: and alſo to give the appellant relief in the declarator. The reſpondent made objections to the title of the appellant to carry on the action, as founded on the deed executed by her deceaſed huſband, which being a teſtament, if it could be ſuppoſed to extend to lands, the deviſe was void by the law of Scotland. The court allowed the proceſs of exhibition at the appellant's inſtance to proceed, reſerving to the reſpondent all objections againſt her title after production.

The reſpondent was afterwards examined upon oath in the exhibition; and made a depoſition to the following purport:

"That in 1684, the time of the Teſt, he was in priſon for not "complying with the temper of that time, and underſtood that "the government was to preſs the Teſt on all heritors, and accord-"ingly by an act of parliament in 1685, the ſame paſſed into a 1685. c. 13. "law:—that he remained priſoner till 1686, and having taken "the advice of lawyers how to preſerve his fortune, upon their "advice he granted a diſpoſition in favour of his ſon, a child then "12 years old, both fee and liferent, but burdened with the pay-"ment of 60,000*l.* Scots, as the deponent ſhould diſpoſe thereof: "that he did this, knowing that Lieutenant-General Drummond "was his near relation, and upon ſight of ſuch a paper, or being "informed of it by the deponent's wife, he could make uſe of it "to protect the deponent from the threatened hazard; and ac-"cordingly he did ſign that diſpoſition, containing many other "conditions and qualities in the deponent's favour, and delivered "it to his wife, with a liberty to her to take infeftment upon "it or not as ſhe thought fit:—and, that thereafter while he was "in priſon there was a ſaſine brought or ſent to him by Arthur "Naſmith, who ſigned as notary to the ſame, and Naſmith, by "letter, deſired him to ſend it back to him: but the deponent, "before he came out of priſon, did cancel both the ſaſine and

" diſpoſition, upon the information that the king was not to preſs " the teſt with that ſeverity: that Naſmith wrote to the deponent " to ſend it back to him, in reſpect that it either was not inſert " in his book, or that he was to inſert it: that there was no re- " giſtration or mark of regiſtration on the ſaſine; and as he gave " it to his wife, ſo ſhe re-delivered it to him, and when ſhe re- " delivered it, ſhe told him, that the diſpoſition had never been " out of her hand, which made the deponent believe there never " was ſaſine taken upon it, but that the ſaſine ſent was but a " ſham: but being interrogated if he did not believe it was a " real ſaſine, deponed that he believed it was: and deponed that " he had not had it in his cuſtody, and knew not where the ſaid " diſpoſition was, but acknowledged that he had the ſaid can- " celled diſpoſition and ſaſine, and ſaid that he laid them among " uſeleſs and cancelled papers, but that he had not ſeen them " ſince the intenting of any proceſs between him and his ſon, " and having occaſion to look through theſe papers on another " account, he had not found either of them, and acknowledged " he did not make a ſearch eſpecially on account of the ſaid " diſpoſition and ſaſine, becauſe his wife told him they were burnt " or deſtroyed: and being interrogated if or not he had ſeen the " ſaid cancelled diſpoſition or ſaſine after the time that differences " began to ariſe between his ſon and him, deponed that he be- " lieved he did ſee them among cancelled papers, but knew " nothing of them then, farther than that his wife told him they " were deſtroyed.—And being interrogated if or not he had the " contract betwixt himſelf and his lady, deponed that he had, " and it ſhould be produced with the infeftment thereon; but he " did not know of any former tailzie made by his prede- " ceſſors."

The appellant, after this depoſition was made, proteſted againſt all the qualities contained in the ſame, in regard there were no qualities contained in the act which directed ſuch examination to be made.

She alſo petitioned the Court, that the reſpondent might be compelled to ſearch for the diſpoſition and ſaſine, and if found, to exhibit the ſame in ſuch ſtate, as they then were.—The reſpondent accordingly was re-examined, and deponed that after ſearch he could not find the diſpoſition and ſaſine.

After adviſing theſe depoſitions, the Court, on the 26th of July 1706, " Found that the defender cancelled the diſpoſition and " ſeiſin warrantably, and that the oath proved not, and aſſoilzied " the defender from the exhibition, and declared him to be " free therefrom."

The appellant preſented two reclaiming petitions to the Court, which were ſeverally " refuſed, and the former interlocutor ad- " hered to," on the 30th of July 1706, and 11th of July 1707. All theſe interlocutors were carried in favour of the reſpondent, by a majority of one vote each time.

The

The appeal was brought from "a ſentence or decree of the Lords of Council and Seſſion made on the behalf of James Muirhead, the 11th July 1707." Entered, 16 Dec. 1708.

Heads of the Appellant's Argument.

The diſpoſition and ſettlement was by the infeftment taken, and inſtrument of ſaſine following thereon, effectually executed according to the law of Scotland. It contained no power of revocation; and the reſpondent could not lawfully cancel or deſtroy it.

The appellant brought her huſband a conſiderable fortune, conſideration of which he contracted for certain proviſions to be ſettled upon her.

The reſpondent's oath proves the execution of the diſpoſition and the infeftment taken thereon. What the reſpondent ſtated in his oath of his intention in executing the deed, was an extrinſic quality of the oath, and ought not to weigh in this matter. Such motive or covered intention was merely *præpoſitum in mente retentum, quod nihil operatur.*

Heads of the Reſpondent's Argument.

It is a rule of the law of Scotland, that the mind and intention of the grantor at the time of making a deed are principally to be conſidered. The diſpoſition in queſtion was merely gratuitous, and for no antecedent onerous cauſe. All the circumſtances of the caſe ſhew that the reſpondent made the diſpoſition only to ſecure his family and protect his eſtate from forfeiture, and that he never intended to diveſt himſelf abſolutely. Many ſimilar conveyances were made by gentlemen in Scotland about the ſame time, and for the ſame purpoſes.

This matter having been referred to the reſpondent's oath, the oath muſt be taken entire, and with all its qualities. There is no proof of the exiſtence of the deed, but in this oath.

After hearing counſel, *It is ordered and adjudged that the ſaid petition and appeal be diſmiſſed this Houſe, and that the ſentence or decree therein complained of be affirmed.* Judgment, 24 March 1708-9.

For Appellant, *T. Powis. Spencer Cowper.*
For Reſpondent, *John Pratt. P. King.*

Caſes 3, and 4.

Fountain-hall, 18th Nov. 1703, and Feb. 1709.

FIRST APPEAL.

Sir Alexander Brand, Knight, - - *Appellant*;
George Mackenzie, - - - - *Reſpondent.*
From a Decree of the Commiſſioners of Treaſury and Exchequer.

SECOND APPEAL.

Sir Alexander Brand, Knight, - - *Appellant*;
Sir Thomas Kennedy, Sir Wm. Binning, and Wm. Baird, Gentlemen, - - *Reſpondents.*
From Interlocutors of the Court of Seſſion.

31ſt *March* 1710.

Society.—One partner diſclaiming money due to the partnerſhip, which in conſequence is not paid, they have recourſe againſt him.
Coſts.—5*l.* given to one of the Reſpondents.

IN 1693, Sir Alexander Brand, the appellant in both appeals, entered into a contract with the Lords Commiſſioners of the Treaſury in Scotland, to import into that country 5000 ſtand of arms, according to a pattern then agreed upon. Soon after, an agreement was entered into between Sir Alexander Brand, and Sir Thomas Kennedy and Sir William Binning, two of the reſpondents in the ſecond appeal, that they ſhould be copartners in the ſaid contract. The arms were accordingly imported; and a memorial was preſented to the Treaſury, ſtating that theſe arms were of ſuperior value to thoſe contracted for in the original pattern. The matter was repreſented to his then Majeſty, who in 1694 appointed the Viſcount of Teviot, then General of the Artillery, to inſpect the arms, and to give his opinion how much they were better than the pattern, and that an allowance ſhould be made to the appellant accordingly. His Lordſhip having reported, that the arms were to the value of 1500*l.* better than the pattern, the Lords of the Treaſury, by a minute on the 3d of May 1694, allowed the appellant the ſaid ſum of 1500*l.*, to be deducted by him out of his rent for the crown lands of Orkney and Zetland, of which he then had a tack.

Sir Alexander executed an acknowledgment or obligation, declaring that Sir Thomas Kennedy and Sir William Binning ſhould have their ſhares of this additional allowance; but diſagreements afterwards ariſing between the appellant and his partners, Sir Alexander inſerted an anonymous advertiſement in the Courant, informing the Treaſury that they had been much impoſed upon in a certain tranſaction, and offering to diſcloſe the ſame if properly rewarded. This advertiſement was anſwered by the Treaſury, and Sir Alexander ſtated that he had been impoſed upon by his copartners in claiming the ſaid additional allowance, and that there

there was no ground for the ſame: and Sir Alexander mentioned to the Treaſury that he deſerved the ſaid 1500*l.* for his great ſervice to the government. Nothing however was at that time done by the Treaſury on the ſubject. The reſpondents in the ſecond appeal, Sir Thomas and Sir William, brought an action againſt him before the Court of Seſſion for payment of their proportions of the ſaid 1500*l.*, in which they obtained decreet againſt him on the 24th of June 1704.

The appellant falling in arrear of his rents for Orkney and Zetland, he was ſued for the ſame, before the Commiſſioners of Treaſury and Exchequer, by the then Receiver-General, and afterwards by George Mackenzie, (the reſpondent in the firſt appeal) the grantee of the Crown. In 1705 he gave in to theſe Commiſſioners a ſtatement of his accounts, in which he acknowledged "*that though he had formerly ſtated an article of* 1500l. *due to him* "*as the ſurplu price of* 5000 *arms, yet having now diſcovered that* "*there was no ground for any ſuch allowance, he would not claim it.*" This ſtatement of accounts was examined by a committee, who made report thereon; and an order or decree of theſe Commiſſioners of Treaſury and Exchequer was made on the 27th of Auguſt 1707, diſallowing the whole articles claimed as deductions by the appellant, and alſo the ſaid ſum of 1500*l.*, *becauſe he had waved the ſame himſelf under his own hand*, and decerning him to make payment to Mr. Mackenzie of the arrears due of his rents.

The firſt appeal was brought from "an order and decree of the "Lords Commiſſioners of the Treaſury and Exchequer made the "27th of Auguſt 1707," and Mr. George Mackenzie the grantee of the Crown, as reſpondent, gave in anſwer thereto. Entered 10 Feb. 1708-9.

After the date of the ſaid order or decree the appellant granted a bond to the reſpondent Sir Thomas Kennedy for his proportion of the ſaid 1500*l.*, but refuſing to come to a ſettlement with Sir William Binning, the latter gave him a charge of payment upon the decreet obtained before the Court of Seſſion in June 1704. The appellant brought a bill of ſuſpenſion, and the Court of Seſſion, on the 24th of December 1707, "decerned Sir Alexander Brand "the ſuſpender to pay to Sir William Binning the charger the "ſum of 416*l.* 13*s.* 4*d.* as his proportion of the ſaid 1500*l.* after "deducting all expences." And to this interlocutor the Court adhered on the 3d and 8th of January 1708. Sir William Binning afterwards aſſigned the ſaid ſum of 416*l.* 13*s.* 4*d.* to the reſpondent William Baird.

And the ſecond appeal was brought from "ſeveral acts, decrees, "and proceedings of the Lords of Council and Seſſion made the "24th June 1704, the 24th of December 1707, and 3d and 8th "of January 1708;" and Sir Thomas Kennedy, Sir Wm. Binning, and Wm. Baird, the aſſignee of the latter, as reſpondents, put in anſwer thereto. Entered 26 January 1709-10.

Of

Of the firſt Appeal.

The appellant's caſe contains a ſtatement of the circumſtances that had taken place in this tranſaction, and of the ſteps that had been taken againſt him in Exchequer, with the particulars of the account of diſcharge produced by him, conſiſting of nine articles, of which the 1500*l.* before mentioned is one, all of which had been diſallowed. But no argument is made uſe of on his behalf; he merely craves that the proceedings, reports, and decrees againſt him may be ſet aſide, and that his caſe may be recommended to the Queen, that he may obtain payment of the balance which he ſtates to be owing to him by the government.

Judgment, 31 March 1710.

After hearing counſel, *It is ordered and adjudged, that the ſentence or decree complained of be affirmed, except with regard to the firſt article claimed by Sir Alexander, being* 677l. 3s. *for fire-arms, &c. furniſhed by him to the government; and with reſpect to this article it is ordered,* "*that it be referred to the Court of Exchequer* "*in Scotland whether the ſaid arms were received by the government,* "*and what value they were of, and that the Court do give the neceſ-*"*ſary orders in order thereunto.*"

For Appellant, *William Atwood.*

Of the ſecond Appeal.

Appellant contends, that though the ſaid 1500*l.* was once allowed by the Lords of the Treaſury, yet they had now refuſed the ſame; and it was unreaſonable that he ſhould pay to his copartners what he himſelf had no allowance of.

Reſpondents' Anſwer.

The Lords of the Treaſury, in obedience to his late Majeſty's letter, allowed the appellant in 1694 the ſaid ſum of 1500*l.*, to be deducted by him out of his rents; and he accordingly retained it in his hands, and the Lords of the Treaſury acquieſced under the allowance of it till 1705; and though at this period the appellant, by his petition before-mentioned, voluntarily diſclaimed the ſame, and it was accordingly refuſed by their Lordſhips, yet it was ſo refuſed upon this reaſon only, viz. *For that the appellant had by writing under his hand diſclaimed the ſame.* But this was done, on his part, merely to defraud his copartners. But by the appellant's conduct in this affair he cannot be allowed to prejudice his copartners, who have an equal right with himſelf. So well convinced was he thereof, that, even after the ſaid 1500*l.* had been diſclaimed by him and refuſed by the Treaſury, he granted bond to Sir Thomas Kennedy for his ſhare, and afterwards paid him a moiety of the money.

After

After hearing counſel, *It is ordered and adjudged, that the petition and appeal of Sir Alexander Brand be diſmiſſed, and that the ſeveral acts, decrees, and proceedings therein complained of be affirmed; and that the ſaid Sir Alexander Brand ſhall pay or cauſe to be paid to the reſpondent Sir Thomas Kennedy the ſum of* 5l. *for his coſts.* Judgment, 31 March 1710

For Reſpondents, *Da. Dalrymple.*
John Pratt.

Only one caſe in each appeal has been found.

Patrick Lord Kinnaird, and Lady Elizabeth his Wife, - - - *Appellants;*

John Riddoch the Truſtee of Catharine Lyon, and the ſaid Catharine Lyon, - - *Reſpondents.*

Caſe 5.

24th *January* 1710-11.

Appeal.—An appeal diſmiſſed and coſts awarded, and directions given to levy the ſame againſt Appellants who had entered into no recognizance.

ON the 21ſt of March 1709-10, the appellants brought their appeal from a decree of the Court of Seſſion of the 28th of February then laſt, by which the Court had preferred the reſpondents as creditors of the Earl of Aboyne deceaſed, to the rents of his Lordſhip's eſtates for the years 1707 and 1708, to the appellant Elizabeth, who had an annuity out of the ſaid Earl's (her firſt huſband's) eſtate. An order was made to put in anſwer to this appeal, and Riddoch accordingly anſwered on the 21ſt of December 1709; and upon his petition, it was ordered "that the cauſe "ſhould be heard on the 18th of January following, and that in "the mean time Lord Kinnaird ſhould enter into a recognizance "to anſwer coſts as uſual (*a*)."

This order was ſerved upon Lord Kinnaird at Aberdeen; but no notice was taken of it, nor did his Lordſhip enter into any recognizance, or appear on the day appointed for hearing. On the 24th of January 1710-11, the reſpondents preſented a petition to the Houſe, ſtating the above facts, and that the appeal had been preſented merely for delay, and praying that it might be diſmiſſed with exemplary coſts: and along with this petition was preſented this affidavit of ſervice upon Lord Kinnaird.

After due conſideration of this caſe, it is ordered, that the petition and appeal be diſmiſſed; and it is further ordered, that the ſaid Lord Kinnaird and his wife ſhall pay or cauſe to be paid to the Journal, 24 Jan. 1710-11.

(*a*) Recognizances at that period were to be entered into according to the terms of the ſtanding order of 20th November, 1680, namely, that the Appellant ſhould, "before any anſwer to his petition," enter into a recognizance for 100l.

ſaid

ſaid John Riddoch, for Catherine Lyon, or to the ſaid Catherine Lyon, the ſum of 40l. *for her coſts and charges cauſed by the ſaid appeal.*

Two days after the date of this order, the ſtanding order of 26th January 1710-11 relative to recognizances was made, which directs that appellants ſhall enter into recognizance of the penalty of *one hundred pounds* within 8 days after the appeal received, to pay ſuch coſts as ſhould be awarded.

On the 17th of March 1710-11, Catherine Lyon preſented a petition to the Houſe, ſtating that Lady Kinnaird had been ſerved with the former order, and refuſed to obey the ſame, of which the petitioner produced affidavit.

Journal, 22d March 1710-11.

It is ordered that theſe words be added to the former order, viz. "*And that the Lords of Council and Seſſion in North-Britain do* "*order the* 40l. *coſts, given by this Houſe to Catherine Lyon, to be* "*levied by the ſame rules and methods as coſts given by them are to* "*be levied.*"

Caſe 6.

Fountainhall, 8th Nov. and 30th Dec. 1709.

James Greenſhields, Clerk, - - *Appellant*;
The Lord Provoſt and Magiſtrates of the City of Edinburgh, - - *Reſpondents.*

1ſt *March* 1710-11.

Appeal.—An appeal competent, though objection made that it implicated the ſentence of a preſbytery.

Kirk Government.—Proceedings againſt an epiſcopal miniſter, before the Toleration Act, 10 Ann. c. 7. who had been impriſoned for exerciſing his function, reverſed on appeal.

THE appellant, by birth a Scotſman, in 1709 opened a private chapel in Edinburgh, where he exerciſed a miniſterial function to ſome members of the communion of the Church of England. The Preſbytery of Edinburgh ſummoned him to appear before them, and to "give an account of himſelf, and of his preſuming "without authority to exerciſe the office of the holy miniſtry "publickly on the Lord's day." He appeared accordingly, and produced to the Preſbytery a diploma of his ordination as a preſbyter *ſecundum ritus et formas Eccleſiæ Scoticanæ* from the Biſhop of Roſs in Scotland, but dated in 1694 after abolition of epiſcopacy in that country: and he ſtated that his orders had been allowed in Ireland, where he had taken the oaths to government, and ſerved two curacies with a fair reputation, of which he produced a certificate from the Archbiſhop of Armagh, and ſome of his clergy: but he declined the juriſdiction of the Preſbytery. They thereupon prohibited him from exerciſing the office of a miniſter, for the reaſon of its "being within their bounds, and without "their

" their allowance, and introducing a form of worſhip contrary to " the purity and uniformity of the church eſtabliſhed by law." And they recommended it to the magiſtrates of Edinburgh to render this prohibition more effectual.

The reſpondents, in conſequence of this recommendation, and of a petition (as they ſtate in their caſe) *ſigned by many hundred hands of the moſt conſiderable in the neighbourhood*, cited the appellant to appear before them; and on his appearing they required him to obey the act of the Preſbytery. The appellant, however, ſtill continued in the exerciſe of the miniſtry as before, and the magiſtrates by their ſentence on the 15th of September 1709 ordered him to be committed to gaol, " there to remain until he ſhould " give ſecurity to deſiſt from the exerciſe of the miniſtry within " their bounds, or to remove himſelf from thence."

The appellant being accordingly committed to priſon, he preſented a bill of ſuſpenſion to the Court of Seſſion, to which the reſpondents put in anſwers, inſiſting " that the ſuſpender having " received ordination from the Biſhop of Roſs after the abolition " of epiſcopacy in Scotland, and the ſaid biſhops being exauctorated, the ſuſpender was not a miniſter duly qualified." In reſpect of theſe anſwers, the Court on the 8th of November 1709 " refuſed the bill." The appellant having preſented a ſecond bill of ſuſpenſion, to which the reſpondents made anſwers, the Court on the 28th December 1709 alſo refuſed the ſame. And the appellant remained in priſon *ſeven months*.

The appeal was brought from " the ſentence of the magiſtrates " of Edinburgh and a decree of the Lords of Seſſion, the firſt the " 15th of September, and the laſt the 28th of December 1709." Entered 13 February 1709-10.

A preliminary queſtion aroſe, whether the appeal was regularly and properly before the Houſe or not; and leave was given to argue this queſtion in the firſt place.

Argument of the Reſpondents on this preliminary Point.

There is no place for this appeal from the Preſbytery of Edinburgh: the Preſbytery is only a ſubordinate eccleſiaſtical judicatory, from which appeals lie in courſe to a provincial ſynod, or the general aſſembly. The appellant cannot in law or good order appeal to the Houſe of Lords, who are only judges upon appeals in the *laſt reſort*.

If this appeal ſhould be held to lie from the ſentence of the Preſbytery, the appellant has not ſummoned or called the proper reſpondents: the ſentence of the Preſbytery cannot be reviewed unleſs they themſelves be called to anſwer for it; and the reſpondents are not the proper parties to make anſwer in this caſe.

Although the appellant pretends only to appeal from the decree of the Court of Seſſion, and the ſentence of the reſpondents, it is evident that he directly libels the ſentence of the Preſbytery as groundleſs and illegal, and therefore to be reviewed; which is in fact

fact an appeal from it. It is manifeſt, that the ſentence of the reſpondents was purely executive; and they were no further concerned, than to make the ſentence of the Preſbytery effectual, as they were obliged to do by law, (particularly by the act of Parliament 1693, c. 22. for ſettling the peace and quiet of the Church, whereby it is expreſsly enacted, "that all magiſtrates, judges, "and officers of juſtice give all due aſſiſtance for making the "ſentences and cenſures of the Church and judicatories thereof "to be obeyed,)" without inquiring into the reaſon of that ſentence, which was wholly *alterius fori*, and not liable to their cognizance. The reſpondents therefore cannot be queſtioned for what they did in obedience to law, unleſs they had exceeded their authority in the execution; which they did not, nor is it pretended by the appellant that they did.

But if the magiſtrates had exceeded in the execution, the appellant had the obvious remedy, which in fact he laid hold of, viz. to complain to the Court of Seſſion by bill of ſuſpenſion. It is certain in law, that no appeal can be made from the execution of any ſentence, unleſs the appeal be firſt brought from the ſentence itſelf; and it is ſuppoſed that the ſame doctrine holds in the Church of England, when writs are iſſued of courſe for executing eccleſiaſtical ſentences, as the writ *de excommunicato capiendo*, from which though it be a civil writ, yet being in execution of the ſentence of an eccleſiaſtical court, there lies no appeal, unleſs the ſentence itſelf be firſt reviewed by the proper judicatory.

Before the late Union of the two nations, it was never known that any appeal from the eccleſiaſtical judicatories of the Church lay properly or regularly to the Parliament of Scotland, nor can any precedent of ſuch appeals be produced.

Journal, 1ſt March 1710-11. The appellant's argument on this preliminary point does not appear; but counſel being heard upon this preliminary point, *Reſolved, that the petition and appeal of this appellant is regularly and properly before the Houſe.*

On the Merits. Heads of the Appellant's Argument.

Though Preſbytery be the legal eſtabliſhed church government in Scotland, yet there is no law of conformity in that country which obliges the laity to be of their communion, nor any law which prohibits the miniſters of the communion of the Church of England from exerciſing their function, or the laity from joining in worſhip with them in a private manner, or which gives the magiſtracy any juriſdiction to inflict penalties on ſuch miniſters or laity. The acts of Parliament on which the ſentences againſt the appellant are pretended to be founded, and particularly the 1695. c. 22. act 1695, c. 22. againſt intruſion into churches, were never intended againſt perſons in ſimilar circumſtances with the appellant. The appellant never intruded into any church or benefice, or deprived any perſon of his right, but exerciſed his function only in

a private houſe to thoſe of the ſame communion with himſelf. Nor is impriſonment warranted by any of the ſaid acts.

The Court of Seſſion ought only to have affirmed or reverſed the ſentence of the magiſtrates for the reaſon upon which it was founded, namely, that contained in the act of the Preſbytery; and they ought not to have proceeded to judgment upon any new reaſon.

And even if the Court might have founded their judgment upon a new reaſon, yet their decree, as to ſuch new reaſon, is contrary to the principles and practice not only of the Chriſtian Church in general, but alſo of the preſent Church of Scotland, which admits Preſbyters ordained by exauctorated Preſbyters, and alſo Preſbyters ordained by Biſhops in ſimilar circumſtances with the appellant, whoſe ordinations have been allowed, and themſelves admitted to the cure of ſouls, as rightly ordained.

Heads of the Reſpondents' Argument.

The reſpondents rely for a full juſtification of the proceedings both of the Preſbytery and themſelves againſt the appellant, by the following acts of Parliament, which are all unalterably confirmed by the Union; viz.

1. The act W. & M. 1689, c. 3. intituled, "Act aboliſhing "Prelacy." W. and M. 1689. c. 3.

2. The act 1690, c. 5. intituled, "Act ratifying the Confeſ- 1690. c. 5. "ſion of Faith, and ſettling Preſbyterian Church Government."

3. An act 1693, c. 6. intituled "Act for taking the oath of 1693. c. 6. "allegiance and aſſurance."

4. An act 1693, c. 22. intituled, "Act for ſettling the [illegible]e 1693. c. 22. and quiet of the church."

And alſo by a proclamation of the 21ſt of March 1706, intituled, "An act and proclamation anent intruders into churches," by which (*inter alia*) "the queen and the lords of her Majeſty's "privy council, prohibit and diſcharge all perſons, who have no "authority from within the church of Scotland, but pretend to a "warrant or licence from the late exauctorat biſhops, ſince they "were exauctorat, to exerciſe any part of the miniſterial function, "within this church, or any kirk or paroch thereof, upon pain "of being ſeized and ſecured by the magiſtrates of the bounds, "in order to their trial, purſuant to the act of parliament of "1693, and the magiſtrates are required to ſeize and ſecure ſuch "perſons, and puniſh them according to law."

And after hearing counſel on the merits, *It is ordered and adjudged, that the ſentence of the magiſtrates of Edinburgh, and the decree of the Lords of Seſſion in North Britain, made againſt the ſaid James Greenſhields, be reverſed.* Judgment, 1ſt March 1710-11.

For Appellant, *Tho. Lutwyche, Hum. Henchman.*
For Reſpondents, *Peter King.*

Soon

Soon after the deciſion in this appeal, an act of parliament was paſſed, 10 Ann. c. 7. intituled, "An act to prevent the diſturbing "thoſe of the epiſcopal communion in Scotland."

Preface to the Hiſtory of the Union, p. 19 et ſeq.

It is ſtated by Defoe, that the preaching of Mr. Greenſhields excited much diſturbance in Scotland, and alarm for the ſafety of the eſtabliſhed church. Addreſſes were preſented to the general aſſembly from Edinburgh and from Haddington; and ſimilar addreſſes were preparing almoſt all over the kingdom, when the proceedings were commenced againſt Mr. Greenſhields.

Caſe 7. James Durham of Largo Eſq. - - *Appellant*;
Robert Lundine Eſq. of Lundine, Alexander Watſon of Aithernie, Andrew Lundine of Straitherlie, and John Lundine of Baldaſter, *Reſpondents*.

20th *March* 1710-11.

Appeal.—An appeal competent, from a decreet in 1698, and interlocutor in 1708, though objection made that a decreet in 1707, confirming that in 1698, was not appealed from.

Teinds.—Prorogations of tacks of teinds, where an augmentation of ſtipend was ſmall, reduced from ſix 19 years to one 19 years.

THE appellant was patron of the pariſh of Largo. In 1698, the then miniſter of Largo, during the appellant's minority, obtained decreet of the *commiſſioners for plantation of Kirks and valuation of Teinds*, for an augmentation to his ſtipend of about 14*l.* per annum, which was allocated upon the teinds of ſeveral heritors of the pariſh:—And in conſideration of this augmentation, the commiſſioners granted to the reſpondents, who were tackſmen of teinds in the pariſh, prorogations of their tacks for ſix 19 years, to commence after expiration of their current tacks, which had then eight years to run. This decreet mentioned the ſhares of the whole ſtipend to be paid by the proprietors of lands in the pariſh, part being to be paid out of the teinds of lands belonging to the appellant.

In 1707 the appellant obtained a decreet of the Lords of Seſſion againſt the reſpondents, by which their old tacks were declared to have expired in 1706, yet the decreet of the commiſſioners in 1698, for prolonging their reſpective terms, was thereby confirmed.

In 1708 the appellant brought an action before the Lords of Seſſion, as commiſſioners for plantation of Kirks and valuation of teinds, for reduction of the ſaid decreet of 1698, on the grounds that it had been obtained during his minority, that no part of the ſtipend ought to have been allocated upon his teinds, and that the prorogations granted to the tackſmen were altogether diſproportionate to the augmented ſtipend charged upon their teinds.

The

The Lords Commiſſioners, on the 23d of June 1708, "found "and declared, that the appellant was not prejudiced by his not "claiming that his own lands ought to have been exempted from "paying his proportion of the miniſter's ſtipend; and therefore "refuſed to relieve the appellant from the ſaid decree of the "Commiſſioners for planting of Kirks in 1698, and diſmiſſed his "action."—The appellant reclaimed, and the commiſſioners, on a rehearing of the cauſe in July 1708, adhered to their former interlocutor.

The appeal was brought from "a decree or ſentence of the "Lords of Council and Seſſion, pronounced the 23d day of June "1708, and a rehearing thereof in July following, whereby they "have affirmed the prolongations, granted by the Commiſſioners "for plantation of Churches, to the reſpondents, of their reſpec-"tive tithes within the pariſh of Largo." Entered 2 January 1710-11.

Heads of the Appellant's Argument.

By an act of the Scots parliament, 1693, c. 25. it is expreſsly provided, that the teinds of the lands belonging in property to the patron ſhould be freed from paying any part of the maintenance of the miniſter, but that the ſame ſhould be laid proportionally upon the teinds of the reſpective proprietors of the pariſh. From this, it appears, that the decreet of 1698, appealed from, whereby the appellant's own lands were burthened with a conſiderable part of the miniſter's maintenance, is expreſsly contrary to the ſaid act of parliament; and he ought to have been relieved againſt this decreet, which was pronounced during his minority. 1693, c. 25.

Though by the act 1690, c. 23. the patron's right to the teinds is burthened with the tacks then ſubſiſting, or prolongations thereof to be made, yet that only hinders the patron from making any greater demand upon tackſmen, while their tacks are current, than the tack duties therein contained; and does not preclude, but that after expiration of theſe tacks, the patron ſhall be entitled to have his own lands exempted, and to have the ſhare of the ſtipend formerly paid by him laid proportionally on the reſpective proprietors of lands in the pariſh, who in recompence have prolongations made of their tacks. 1690, c. 23.

The ſaid act 1690, c. 23. expreſsly imports that all prolongations to be granted of tacks of teinds ſhall be *effeiring* to the augmentation granted. But in the preſent caſe no ſuch proportion has been obſerved; for the augmentation is only about 14*l.* *per annum*, and the teinds of the pariſh, excluſive of thoſe of the appellant's own lands, over and above paying the whole ſtipend to the miniſter, are worth about 100*l.* *per annum*.

Heads of the Argument of the Reſpondent Robert Lundine (*a*).

This appeal is not regularly brought; for the decree which the appellant obtained in 1707, declaring the old leaſes to be expired, but ratifying the decree of 1698, is not appealed from by him.

(*a*) No other reſpondent's caſe has been found.

And therefore though the decree of 1708 ſhould be reverſed, that of 1707 muſt ſtill ſubſiſt.

In 1633, Patrick Black, then patron of the pariſh of Largo, (to whom the appellant is ſingular ſucceſſor in this patronage and eſtate of Largo,) having right to the whole teinds of the pariſh by a tack from the then parſon, did, for an onerous conſideration, ſell and diſpone to the reſpondent's anceſtor, not only all his then intereſt in the teinds of the eſtate of Lundine, by virtue of the tack granted to him or otherwiſe, but alſo all ſuch future right and title to the ſaid teinds as he the ſaid Patrick Black, his heirs or ſucceſſors, ſhould or might claim or acquire, ſo far as concerned the lands and barony of Lundine. And he thereby obliged himſelf, his heirs and ſucceſſors, patrons of the ſaid church and pariſh of Largo, to do all further acts for eſtabliſhing heritably, or otherwiſe, the right of the teinds of the lands and barony of Lundine, in property to the reſpondent's anceſtor, his heirs and ſucceſſors, he and they indemnifying the ſaid Patrick Black, his heirs and ſucceſſors, from the miniſter's ſtipends laid or to be laid on the lands of Lundine: and Patrick Black then agreed to take a proportional ſhare with the reſpondent, and other heritors, of the miniſter's ſtipend upon his own lands.—When the appellant's anceſtor, therefore, purchaſed the ſaid eſtate and patronage of Largo, he took it with ſuch ſhare of the miniſter's ſtipend charged thereon, and had an allowance for the ſame in his purchaſe. The right of the reſpondent's anceſtor to the teinds of his own eſtate, is by the ſame acts of parliament whereon the appellant founds his right expreſsly excepted and reſerved to him by theſe words, "*not heritably diſponed*."—Thus the ſame accidental intereſt, which was by that act given to patrons, did as to the teinds of his own eſtate accrue to the reſpondent; and in this reſpect the appellant's caſe is quite different from that of other patrons and heritors.

By the decreet of 1698, the appellant's eſtate is not charged with any part of the augmented ſtipend, it only charges him with part of the old ſtipend, which Patrick Black, his predeceſſor, took upon himſelf, and which was deducted in the purchaſe by the appellant's anceſtor.

The ſame act of parliament which gave to patrons the right to teinds "*not heritably diſponed*," did it with the burthen of augmentations to the ſtipends of miniſters, and of tacks and prolongations thereof to heritors: and the prolongation to the reſpondent granted in the decreet of 1698, is warranted by all the acts appointing Commiſſioners for plantation of Kirks, &c., who are thereby empowered to grant ſuch prolongations, without any reſtriction as to the length of the then current tacks, or for what terms they ſhould be prolonged.

Judgment, 20 March 1711.

After hearing counſel, *It is ordered and adjudged, that the decree or ſentence complained of in the ſaid appeal made in the year* 1698 *by the Commiſſioners for the plantation of Churches for prolongation of the leaſes therein mentioned for ſix* 19 *years, and the decree or ſentence made in the year* 1708, *by the Lords of Council and Seſſion in North Britain*

Britain in affirmance of the former decree or ſentence as to the prolongation of the ſaid leaſes be reverſed, ſo far as the ſame relates to the prolongation of the ſaid leaſes, except only as to the firſt nineteen years of the ſix 19 years.

For Appellant, *Jo. Pringle.*
For Reſpondents, *Sam. Dodd.*

Sir Andrew Kennedy, Baronet, - - *Appellant;*
Sir Alexander Cuming, Baronet, - - *Reſpondent.*

Caſe 8. Fountainhall, 3d Jan. 1706. 19 March, 19 Nov. 9 Dec. 1707. 16 Jan. 24 Feb. 9 Dec. 1708. 5 Feb. 1709.

19th *April* 1711.

Public Officer.—The office of conſervator, held by a grant under the great ſeal to a father and his ſon jointly, being upon complaint of the father's malverſations granted to a third perſon, without previous ſentence; this new grant was void.

Certain malverſations alleged againſt the conſervator not relevant to infer deprivation. Forbes, 3 Jan. 1706.

Proof.—The malverſations of a conſervator being found proved *per ſingulares teſtes*, the judgment is reverſed. 18 March, 19 Nov. 1707.

Act of indemnity.—Malverſation thereby remitted. 16 Jan. 1708.

Expences of the court below given to *an appellant*.

Proceedings on the mode of aſcertaining the amount of theſe expences.

THE office of Conſervator of the Scots Privileges in the Netherlands is very antient; it was held by grant under the great ſeal of Scotland: to it ſeveral powers and faculties were committed in relation to trade, treaties with foreign ſtates, and other matters that concerned the government and public peace.

By many ancient treaties, and by a contract made between the royal burghs of Scotland, with the approbation of his Majeſty King William, on the one part, and the ſtates of Zealand and town of Campvere on the other part, in 1699, and by an act of the parliament of Scotland, Campvere was appointed the port where all ſtaple goods, ſuch as linens, woollens, hides, butter, oil, tallow, pork, beef, ſalmon, lead ore, &c. of the manufacture, growth, and produce of Scotland were to be landed. By this contract the Scots had many privileges and advantages.

For the better maintaining theſe privileges, and that the conſervator might have more ready acceſs to the ſtates and their ſenates abroad, he was veſted with the character of a public miniſter, as reſident for the whole provinces; and had juriſdiction over Scotſmen both civil and criminal. By ſeveral acts of parliament he was obliged to keep courts, and adminiſter juſtice according to the laws of Scotland, and thoſe who ſued before any other judicature were puniſhable: where differences aroſe between the Scots and Dutch, the conſervator was to appoint arbitrators; and if they made no determination, he was to ſit and judge with Dutch magiſtrates. 1503, c. 81. 1579, c. 96.

Their Majeſties King William and Queen Mary, in 1689, granted a commiſſion under the great ſeal of Scotland to the appellant to be conſervator of the Scots privileges in the Netherlands, and their Majeſties' reſident for the affairs of Scotland within the ſeventeen United Provinces for and during his life. In 1697, a new grant was obtained of the ſaid office from King William, alſo under the great ſeal of Scotland, to the appellant, Sir Andrew, and his ſon John Vere Kennedy jointly during Sir Andrew's life, and after his death to John Vere Kennedy for and during his Majeſty's pleaſure.

The office of conſervator was adminiſtered for ſome time under theſe grants, by the appellant (*a*): complaints, ſoon after, began to be made by the ſtates of Zealand and the magiſtrates of Campvere to King William, and to the royal burghs, and afterwards to Queen Anne, of a non-obſervance of the ſtaple contract. The parties in this appeal are not agreed with regard to the grounds of ſuch complaints; the reſpondent ſtates, that they were occaſioned by the appellant and his ſon having neglected and abuſed their truſts; whereas the appellant mentions, that the original memorials from the ſtates of Zealand and the magiſtrates of Campvere did not criminate or charge him; but that afterwards, at the inſtigation of one Iſaac Denheldt, burgo-maſter of Campvere, his perſonal enemy, letters were written to the convention of royal burghs, complaining of his adminiſtration.

In 1702, the convention of royal burghs gave commiſſion to two perſons to go to Campvere, and to inveſtigate theſe complaints. The parties, likewiſe, are not agreed with regard to the proceedings of theſe commiſſioners. The appellant ſtates, that after their arrival Denheldt gave in ſeveral complaints againſt him, which being laid before the royal burghs, they were all after a ſtrict examination found groundleſs; and the royal burghs never did paſs any ſentence or cenſure upon the appellant: the reſpondent, on the contrary, mentions, that the commiſſioners having made their report to their principals, it appeared that the appellant and his ſon had been guilty of very great miſdemeanors; that this report being ratified by a new committee of the burghs, an abſtract thereof was made, and the report laid before her then Majeſty.

On the 7th of April 1705, her Majeſty executed a warrant for a new grant of the ſaid office to be made in favour of the reſpondent Sir Alexander Cuming, proceeding upon a recital, that *after trial and cognition of Sir Andrew Kennedy's and his ſon's malverſations in their ſaid office, they had forfeited the ſame;* and her Majeſty thereby ordained her advocate and ſolicitors to proſecute all actions neceſſary for annulling the former grant, and for making that in favour of the reſpondent effectual. A commiſſion in conſequence thereof paſſed the ſeal, and the reſpondent entered upon his

(*a*) It does not with certainty appear whether the appellant's ſon took any part of the adminiſtration: the reſpondent ſtates that the appellant and his ſon did not take the oaths upon their joint grant of the office, and though the ſon is charged generally in ſome parts of the reſpondent's caſe with miſdemeanors, no particular inſtances are ſtated.

office,

office, and was received as her Majeſty's miniſter by the States General of the town of Campvere.

The appellant thereupon commenced an action of reduction and declarator before the Court of Seſſion againſt the reſpondent, for reduction of the commiſſion granted to the latter, and to have his own right under the former commiſſion declared. In this action he inſiſted that the grant to the reſpondent proceeded upon miſrepreſentation of matters of fact; that the Queen's warrant was razed in eſſential places, and that it was contrary to the claim of right, ratified by act of parliament 1703, *c.* 3., which declares all forfeitures before ſentence to be againſt law. The Court found "that Sir Alexander Cuming could not warrantably obtain "poſſeſſion of the ſaid office by virtue of his commiſſion until "Sir Andrew Kennedy's action of reduction and declarator were "determined, or that Sir Alexander had obtained a decreet de-"claring his right thereto."

A counter-action was afterwards brought in name of the reſpondent and the officers of ſtate for affirming the grant of the office to him; and to have it declared, that the appellant by malverſations in his office had incurred a forfeiture of the ſame. Various articles of miſdemeanor were inſiſted upon by the reſpondent; but, as theſe form no part of the queſtion at iſſue by the preſent appeal, they are not here detailed. A proof was taken both in Scotland and in the Netherlands, and many witneſſes were examined; parties were afterwards heard upon the proof, and a new matter of diſpute aroſe in the cauſe, namely, an act of indemnity. made in 1703, and ratified by parliament, bearing to be a full amneſty of all tranſgreſſions in public offices, and a bar to all proſecutions for ſuch tranſgreſſions preceding that date. Parties are not agreed with regard to the manner in which this matter of the indemnity aroſe in the cauſe. The appellant ſtates, that it was taken notice of by the Court, without having been pleaded by him: whereas the reſpondent mentions that *it was ſo pleaded* by the appellant, as appeared from ſeveral places of the decree, though he would now *untruly* ſuggeſt the contrary.

Parties were heard by order of the Court on this point of the indemnity; and the reſpondent contended, that the act did not extend to pardon offences in miniſters abroad committed againſt foreign ſtates, who in this caſe were proſecutors, and ought not to be debarred of their right, by the law of nations, of being freed from a miniſter, whom they had complained of in their letters and memorials as *negligent*, *factious*, *ſeditious*, *turbulent*, and *vexatious*. And though the ſaid act might excuſe the appellant from being puniſhed, it could not be extended to reſtore him to an office which he had forfeited, nor repone him to that reputation which was neceſſary for the public ſervice abroad. "Indulgentia, patres "conſcripti, quos liberat, notat; nec infamiam criminis tollit, "ſed pœnæ gratiam facit. L. 9, Cod. T. 43. de generali abolitione." The Court ſuſtained the defence founded on the indemnity as to all malverſations of omiſſion or commiſſion committed by the

appellant preceding the date thereof. And ſo far the judgment of the Court is not appealed from.

The cauſe being thus narrowed, the reſpondent inſiſted that the appellant had been guilty of miſdemeanors ſince the date of the indemnity; and the cauſe being heard, the Court on the 9th of December 1707 pronounced the following interlocutor: "Having conſidered the ſtate of the proceſs, and having adviſed "the debate, with the depoſitions of the witneſſes, and writs "produced, find it proved that the appellant did, ſince the act of "indemnity, receive conſervator dues for ſtaple goods belonging "to Dutch and Iriſhmen coming directly from Ireland to the "ſtaple port of Campvere, and that he was in the knowledge "thereof, which they find to be a malverſation in his office of "conſervator relevant to infer deprivation; and therefore reduce "the gift in the appellant's favour, and decern and declare the "reſpondent's right to the ſaid office by virtue of his commiſ-"ſion." The appellant reclaimed, and the cauſe being re-heard, the Court adhered to their former interlocutor.

Entered 20 February 1710-11.

The appeal was brought from "a decree made by the Lords "of Council and Seſſion the 9th December 1707."

Heads of the Appellant's Argument.

The reſpondent's commiſſion is contrary to law, and granted upon a miſrepreſentation made to her Majeſty, and on that account the reſpondent had no title to ſue the appellant for any miſdemeanors, though he had been really guilty thereof, as in fact he was not. And further the warrant for the reſpondent's commiſſion, after it had paſſed her Majeſty's royal hand, was razed in two very material places; the firſt, where her Majeſty does actually recal the commiſſion granted to the reſpondent, and his ſon, three lines are razed out; the other, where her Majeſty orders the great ſeal to be appended, the word *thereunto* is razed out, and the words *and paſs per ſaltum* are put in.—By this laſt alteration the reſpondent prevented the commiſſion from being laid before the Privy Council, as was uſual, having no reaſon to believe the Privy Council would agree to the paſſing a commiſſion againſt law; eſpecially ſince the warrant had been razed after her Majeſty had ſigned it.

The facts alleged to have been committed by the appellant were according to uſual and former practice in the office, and not ſufficient to infer a forfeiture; and even theſe facts were not proved againſt him by two unexceptionable witneſſes. For by the law of Scotland no proof is ſuſtained, unleſs upon the oath or teſtimony of two lawful witneſſes to one and the ſame fact; but the two witneſſes, Hamilton and Douglas, upon whoſe evidence only this decree is founded, depone to things entirely different. And even this evidence does not amount to a proof of the miſdemeanor laid to the appellant's charge, viz. *That he was in the knowledge thereof.*

Heads

Heads of the Reſpondent's Argument.

The clauſe delete in the warrant was thought ſuperfluous, and ſcored out by the chancellor in favour of the appellant, that he might not be precluded from juſtifying himſelf if he was innocent. There was no objection upon this pretended nullity, until after the decree was pronounced, and it could not then be received: nor would it have availed the appellant at any time, he being proſecuted at the queen's ſuit.—As the reſpondent's grant under the great ſeal was ſufficient; ſo he has a new commiſſion, ratifying and confirming the former in every article, and conferring the office *de novo*.—And as to the pretended addition of the words *per ſaltum* in the warrant, the ſame is falſe, as may appear by the warrant itſelf, and ſecretary's docket.

The malverſations, ſubſequent to the indemnity, on which the Court pronounced judgment, were, That contrary to the 3d and 13th articles of the Staple Contract, made in the appellant's own time, and an expreſs order of the burghs *anno* 1699, and his own ſigned inſtructions, he had betrayed his truſt, by allowing the importation of Iriſh goods belonging to Dutchmen, &c., and permitting the ſame (for a gratification to himſelf) to be entered at the ſtaple port as Scots goods, and thereby to enjoy the immunity of cuſtoms, &c. to the great loſs of the trade, manufactures, and native produce of his nation. And thoſe were proved by ten concurrent witneſſes (*a*). There have been grants of the ſame and other offices upon miſdemeanors of perſons having them for life, without any previous ſentence, or ſo much as an inquiſition of ſuch miſdemeanors or proofs thereof from record as there were in this caſe. And the appellant being a foreign miniſter, and as ſuch having injured foreign ſtates, there was no need of a formal ſentence, before iſſuing out the grant, the proofs of his miſdemeanors upon record being ſufficient. And the proſecutors were not bound to wait relief from the decree of ordinary judicatures, but had immediate recourſe to the fountain of juſtice, her Majeſty being in ſome meaſure anſwerable for his behaviour, and ſo of herſelf capable to grant redreſs, which was neceſſary for preſerving the public peace, and preventing repriſals, embargoes, and arreſts, &c. which are the common remedies where juſtice is denied or delayed to ſovereign ſtates.

After hearing counſel, *it is ordered and adjudged, that the decree of the Lords of Council and Seſſion in Scotland, complained of in the appeal of Sir Andrew Kennedy, be reverſed: and it is declared and adjudged, that the ſaid commiſſion granted by her Majeſty to Sir Alexander Cuming is void, and that the ſaid commiſſion granted to Sir Andrew Kennedy and John Vere Kennedy is ſtill ſubſiſting in full force: And it is further ordered, that the Lords of Council and Seſſion do direct the expences in theſe ſuits to be taxed according to the courſe of their Court, and paid to Sir Andrew Kennedy by Sir Alexander Cuming: and that* Judgment, 19 April 1711.

(*a*) From Fountainhall, 16th Jan. 1708, it appears that the witneſſes on the point appealed from were *ſingulares teſtes*, notwithſtanding this general allegation of the reſpondent.

Sir Andrew Kennedy be quieted in the enjoyment of the ſaid office; and as to the meſne profits of the ſaid office the ſaid Sir Andrew Kennedy is left at liberty to purſue ſuch remedy as he ſhall be adviſed to take for the ſame.

For Appellant, *John Pratt.* *P. King.*
For Reſpondent, *Edward Northey.* *Robert Raymond.*

After diſcuſſing the Appeal. Fountain-hall, 25 July 1711. 25 June, 26 July 1712. Forbes, 21 July, 9 Nov. 1711. 26 June, 30 July 1712. Journal, 2 June 1712. 17 June and 7 July 1714.

Proceedings with regard to the Expences of the Court below, awarded to the Appellant.

ON the 2d of June 1712, a petition of Sir Andrew Kennedy was preſented to the Houſe, ſhewing, "That the Houſe, the 19th "of April 1711, upon hearing an appeal brought by the petitioner againſt a decree made by the Lords of Council and "Seſſion in Scotland on the behalf of Sir Alexander Cuming, "did reverſe the ſaid decree, and order the Lords of Seſſion to "direct the expences in the ſuits mentioned in the ſaid order to "be taxed according to the courſe of their court, and to be paid "to the petitioner by the ſaid Sir Alexander; and that on the "4th of July laſt the petitioner did apply to the ſaid Lords of "Seſſion in order to have the ſaid expences taxed, but they had "delayed the doing thereof."—And the petition prayed, "that "the Houſe would be pleaſed to tax the ſaid expences, or order "the Lords of Seſſion forthwith to tax the ſame."—Upon this petition an order was made, "that the Lords of Council and Seſ-"ſion ſhould forthwith tax the ſaid expences, and direct the ſame "to be paid to the petitioner purſuant to the order and judgment "of the Houſe."

On the 17th of June 1714, a petition of Sir Andrew Kennedy and John Vere Kennedy his ſon, conſervators of the Scots privileges in the Netherlands, was preſented to the Houſe and read; reciting the judgment of the 19th of April 1711, and complaining of the contempt of the ſaid judgment, and praying, "That "directions might be given for ſatisfying the petitioners for their "great and extraordinary damages ſuſtained thereby; and that "the ſaid judgment might be made effectual, ſo that the petitioner might have the coſts paid him which the Lords of Seſ-"ſion had decreed, in ſuch manner as to the Houſe ſhould ſeem "meet." This petition was referred to a committee to examine the allegations thereof, and report their opinion thereupon to the Houſe.

On the 7th July thereafter the committee made their report, "That the committee had conſidered the ſaid petition, and exa-"mined the allegations thereof, and heard the parties in relation "thereunto; and it appearing that Sir Alexander Cuming had "not made payment of the coſts, which purſuant to the ſaid or-"der or judgment of the Houſe were taxed by the Lords of "Seſſion at the ſum of 100*l.* ſterling; and notwithſtanding the "ſaid Sir Alexander did pretend to be entitled to a debt owing "by Sir Andrew, for which he pleaded compenſation; as alſo that "the creditors of Sir Andrew had attached this ſum in his hands;

"never-

" nevertheleſs, neither of the ſaid allegations were made good by " the ſaid Sir Alexander: and in reſpect the ſaid coſts ought to have " been immediately paid, the committee were therefore of opi- " nion, that the ſaid ſum of 100*l.* ought to be forthwith paid to " the ſaid Sir Andrew, and which ought to be declared no way " ſubject to or affectable by any pretence of compenſation or at- " tachment:—and it having further appeared to the committee " that Sir Andrew Kennedy and John Vere Kennedy his ſon had " not the full enjoyment and poſſeſſion of their office of conſer- " vator as directed by the order of the Houſe, notwithſtanding " her Majeſty's letter to the States General on behalf of the ſaid " Sir Andrew and his ſon; and that Sir Andrew in endeavour- " ing to obtain poſſeſſion of his ſaid office having been put to " very great trouble and expence, occaſioned chiefly by a poſte- " rior commiſſion granted to Sir Alexander Cuming under the " great ſeal for the ſaid office (which had been preſented to the " States of Zealand and magiſtrates of Campvere); it was there- " fore the opinion of the committee, that the Houſe ſhould be " moved, that an humble addreſs ſhould be preſented to her Ma- " jeſty, that her Majeſty would be graciouſly pleaſed to grant a " new poſterior commiſſion of the aforeſaid office of conſervator " to the ſaid Sir Andrew Kennedy and John Vere Kennedy, that " thereby the ſaid order of the Houſe might be rendered effectual " to them."

This report was agreed to by the Houſe, and orders accordingly made in terms thereof.

In the Dictionary of Deciſions, vol. II. voce Preſumption, p. 133. a judgment of the Court of Seſſion ſuſtaining the gift in favour of the reſpondent, though ſome words were added to its warrant, and others ſcored out, is given as a ſubſiſting deciſion; but as this gift was totally reduced by the Houſe of Lords, the judgment is not now an exiſting precedent.

It appears from Fountainhall (26th July 1712), that Sir Andrew Kennedy ſtated to the Court of Seſſion, that the ground of the judgment of the Houſe of Lords was, " that they found neither " a juſt nor a probable cauſe on Sir Alexander Cuming's part, " his gift being impetrate from the queen by obreption and ſur- " priſe againſt the claim of right ſecuring liferent offices, and " on a falſe narrative of Sir Andrew's malverſations; and the " warrant vitiate and ſcored and found to be a null right; who " on all theſe grounds had modified expences."

Caſe 9.
Fountain-hall, 15 July 1710.
Forbes, 24 July 1710.

Katherine Moniepenny, Widow, - - *Appellant;*
John Brown, and Iſabel his Wife, - - *Reſpondents.*

15th *May* 1711.

Teſtament.—A teſtament executed *in extremis* reduced, where the teſtator's hand was ſupported and aſſiſted in writing the latter part of his name.

THE reſpondent Iſabel, ſiſter to the late George Moncrieff of Sauchop, and John Brown her huſband, brought an action before the Court of Seſſion for reduction of Mr. Moncrieff's laſt will and teſtament as not having been duly executed. It bore date the 19th of November 1707, the day of Mr. Moncrieff's death, and by it great part of his perſonal eſtate was bequeathed to the appellant his widow, whom he appointed executrix. A proof was taken in this action, by which it appeared that the deceaſed, whoſe diſorder was a conſumption, on the ſaid 19th of November, the day of his death, gave directions to one Watſon for drawing the will, and approved of it when read over to him; that he wrote part of his name to the will, (George Mon) but was aſſiſted in writing the latter part, which differed from the mode in which the deceaſed had been accuſtomed to ſpell his name; and that he died a ſhort time afterwards.

The Court on the 14th of July 1710 "declared the ſaid teſta-"ment null and void, the ſubſcription not being finiſhed by the "deceaſed without aſſiſtance, nor executed according to law." And by a ſecond interlocutor on the 15th of November 1710, the Court "found, that the teſtator did not complete his ſubſcrip-"tion, but that his hand wavering he was ſupported by the writer, "who aſſiſted him to write the laſt ſyllable of his name, and "therefore declared the ſaid will null and void."

Upon the appellant's petition witneſſes were re-examined upon this point, whether they had heard the teſtator acknowledge his ſubſcription after the will was ſigned; and the Court by their interlocutor on the 3d of February 1711 "found this not proved, "and therefore adhered to the former interlocutors, and reduced "the ſaid will."

Entered, 22 March 1710-11.

The appeal was brought from "a decree of the Lords of "Council and Seſſion of the 14th of July 1710, and the affirm-"ance thereof the 3d of February following."

Heads of the Appellant's Argument.

The will is in itſelf a moſt juſt and equal diſpoſition of the perſonal eſtate of the teſtator. All the witneſſes agree, too, that the teſtator was of perfect and ſound judgment, and that he moſt diſtinctly gave directions to Watſon to write the will as it now ſtands, and named and ſent for the particular perſons that he wiſhed to have as witneſſes to the execution of it. And Watſon having written out the will according to theſe directions, he read the ſame to the teſtator, who being aſked if he was pleaſed there-

with,

with, anſwered he was very well pleaſed: that thereupon the teſtator ſigned the ſame, and wrote *George Mon* without any aſſiſtance; but Watſon perceiving his hand to waver took him by the "ſhackle-bone," and ſupported his hand while he wrote the reſt of his name; yet ſince he lived ſome time after ſigning the ſaid will, and had ſo fully given directions for having it drawn in the manner it now appears, it ought to be eſteemed his deed, and duly executed by him. And though there was ſome little variation from the teſtator's uſual mode of ſpelling, indulgences of this kind ought always to be allowed to dying perſons. Nor is it of any moment that the witneſſes did not hear the teſtator acknowledge his ſubſcription; that is only requiſite, where witneſſes are not preſent when a deed is ſigned: but in this caſe, the four witneſſes heard the teſtator give directions to write the will, heard him approve of it when read to him, and were preſent in the room and *ſaw* (*a*) him ſign, which is all that the law of Scotland requires.

The laws of all nations have agreed in this, *ut ultima voluntas defuncti ſortiatur effectum*, and therefore ſeveral things neceſſary to complete deeds *inter vivos* are diſpenſed with in wills, where the principal thing is the indication of the teſtator's purpoſe.

Heads of the Reſpondents' Argument.

In matters of this nature the law does not regard intention as ſufficient, though never ſo carefully expreſſed, if that intention was not reduced to a complete and formal act. The teſtament in queſtion can never be deemed to have been completed by the teſtator himſelf, ſince the ſubſcription was not finiſhed by himſelf, and the laſt part of it appears to be of a different hand, and more regularly written than the firſt part of it; and the name is ſpelled in a different way from what the teſtator had been accuſtomed to, and in the manner it is written by Watſon in the body of the will. It was further not executed according to law, for though there were four ſubſcribing witneſſes, yet three of them could not poſitively depone that they ſaw the teſtator ſign the will from his poſition in bed, neither did they hear him own his ſubſcription, after it was ſigned; and without one of theſe, by the law of Scotland no will or deed can be complete. 1681, c. 5. "Si quæramus an valeat "teſtamentum, in primis animadvertere debemus, an is qui fecerit "teſtamentum, habuerit teſtamenti factionem; deinde ſi habue-"rit, requiremus, an ſecundum regulas juris civilis teſtatus ſit." Digeſt. L. 28. t. 1.

Whatever favourable interpretation wills may receive, when once ſolemnly completed, it is abſolutely neceſſary that the rules of law in the execution of them ſhould be exactly obſerved.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal of Katherine Moniepenny be diſmiſſed, and that the decree therein complained of be affirmed.* Judgment, 15 May 1711.

For Appellant, *P. King.*
For Reſpondents, *Tho. Lutwyche.* *James Graham.*

(*a*) The reſpondents ſtate that the witneſſes *did not ſee* him ſign. The fact appears from Fountainhall to have been, that they ſaw him take the pen in his hand, but from his poſition in bed Watſon only ſaw what followed.

Caſe 10.
Fountainhall, 1 Feb. 1710.
Forbes, 27 Dec. 1711.

John Crawfurd, an Infant, by Jane his Mother and Guardian, - - *Appellant;*
Archibald Crawfurd Eſq. - - *Reſpondent.*

5th *April* 1712.

Minor non tenetur placitare.—The maxim does not take place in a reduction upon the head of dole, or fraud in the minor's father.

Proof.—A deed found proved to be fraudulently altered upon ocular inſpection of the different pieces, and a letter from one of the perpetrators of the fraud.

Coſts.—40*l.* coſts given againſt the appellant, a minor.

THE parties were grandchildren of James Crawfurd of Ardmillan, the reſpondent being the ſon and heir of his eldeſt ſon, and the appellant the ſon and heir of his third ſon.

The reſpondent brought an action of reduction, improbation, and declarator before the Court of Seſſion againſt the appellant, for ſetting aſide certain deeds by virtue of which the appellant claimed the family eſtate of Ardmillan, and the reſpondent ſtated the circumſtances of the caſe to be as follows:

That, the ſaid James Crawfurd the grandfather in 1682, executed a deed of ſettlement or entail of his eſtate to himſelf in liferent, and to James Crawfurd (the reſpondent's elder brother ſince deceaſed) his grandſon by his eldeſt ſon William, and the heirs male of his body in fee, whom failing to the other heirs male of the body of his ſaid ſon William and the heirs male of their bodies, whom failing to Andrew Crawfurd his ſecond ſon and the heirs male of his body, whom failing to James Crawfurd his third ſon, (father of the appellant) and the heirs male of his body, &c.: upon this deed reſignation was made in the hands of the ſuperior, the Biſhop of Galloway, in September 1682, and a new charter and infeftment expeded in terms thereof.

That James the grandſon, the inſtitute in the entail, died without iſſue, leaving the reſpondent his brother under age: and Andrew the ſecond ſon of the entailer alſo died without iſſue. About this time a contrivance was carried into execution by the father and the third ſon James to defeat the former ſettlement, of a ſingular nature: this former deed was of the hand-writing of James the ſon, who had been bred to the law: it conſiſted of three ſheets paſted together, and ſigned at the joinings, and contained no power of revocation: but by cutting off two of theſe ſheets and part of the third, and joining three new ſheets to the ſaid tail-piece, a deed was manufactured bearing to be to the ſame ſeries of heirs as the former, but containing a power of redemption upon payment of 3*l.* Scots: in purſuance thereof, the father uſed an order of redemption, and, on the 10th of May 1698, executed a new deed of ſettlement of his eſtate to James his third ſon, and his heirs heritably and irredeemably, and upon this deed James the ſon was infeft in 1705,—and died in 1706, leaving the appellant his ſon and heir under age:

But

But the reſpondent Archibald, living in the houſe with his grandfather, by ſome means got poſſeſſion of that part of the original deed, which had been cut off, and a letter from James the ſon to his father, dated in 1696, which explained the tranſaction: the reſpondent after his grandfather's death ſerved himſelf heir to his elder brother deceaſed.

And his action concluded, that it ſhould be found and declared, that the ſaid original deed contained no power of redemption, that the tranſaction had taken place in manner before mentioned, and that the two ſheets and part of the third, (then produced by the reſpondent,) ſhould be added to the tail of the vitiated deed, as it had originally ſtood: and the reſpondent produced alſo the ſaid letter from James the ſon to his father, dated in March 1696.

The appellant appeared by his mother and curatrix, and pleaded for defence to this action, that *minor non tenetur placitare ſuper hereditate paterna*, and that it was only neceſſary for him to produce his father's infeftment to free him from the action; but the Court finding that the maxim did not defend from the production, but reſerving conſideration thereof after production, the appellant produced the whole deeds called for.

The deed of 1682, being inſpected and compared with what the reſpondent had already given into court, on the 19th July 1711 the Court "found that the two ſheets and 13 lines produced "by the purſuer, had been a part of and joined to the laſt ſheet "of the diſpoſition granted by James the grandfather to his "grandſon James produced; and that the ſaid three firſt ſheets "of the ſaid diſpoſition as it is now produced by the defender, "containing a clauſe of redemption, have been falſely paſted to "the laſt ſheet in place of the ſaid two ſheets and 13 lines cut "off; and therefore found the clauſe of redemption contained "in one of the three ſheets ſo paſted, null, and likewiſe the order "of redemption uſed thereupon; and found the conveyance "to the defender's father null; with the charter and ſaſine fol-"lowing thereupon."

And after a hearing with regard to the maxim, the Court on the 27th of December 1711 "found that the maxim of minor "non tenetur placitare ſuper hæreditate paterna did not take "place in this caſe."

The appellant having reclaimed againſt both theſe interlocutors, the Court by ſeveral interlocutors, (the laſt of them being dated the 11th of January 1712) adhered to the ſame.

The appeal was brought from "a ſentence or decree pro- Entered, "nounced by the Lords of Council and Seſſion the 19th July 8 Feb. 1712. "1711, and by them adhered to after ſeveral re-hearings, the "laſt of which was on the 11th day of January following."

Heads of the Appellant's Argument.

The rule *minor non tenetur placitare ſuper hæreditate paterna* is a maxim allowed by the law of Scotland, and alſo by the law of England. By it there is to be a ſtay of all proceedings againſt the minor, when the right of his inheritance deſcending from his father,

ther, who died laſt ſeiſed, is put in queſtion: it is founded upon this, that a minor, is not held to have any conuſance to plead in defence of his title. And in the preſent caſe, this maxim was the only defence pleaded by the appellant, or any perſon on his behalf.

And though there be falſehood or *dolus* alleged in the preſent caſe; yet there is no falſehood or *dolus* alleged againſt the minor, whoſe privilege is inſiſted on, till he himſelf be in a capacity of pleading. If a bare allegation of ſuch crimes be ſufficient, every minor might be eaſily defeated of his privileges: and in the caſe of *Kello* againſt *Pringle*, 31 January 1665, it was found that the allegation of *dolus & metus* was not ſufficient to take away from a minor the benefit of the maxim; and there never was any deciſion to the contrary.

Stair's Deciſions, vol i. No. 259.

The interlocutor of the 19th July 1711, was a determination of the matter of fact before any iſſue was joined, and without evidence; for nothing more was inſiſted upon for the appellant than his minority, and his privilege of minority was not determined until the 27th of December 1711, which was near ſix months after pronouncing the interlocutor.

And even if the matter of fact might have been examined into, yet it is not found, that there was any alteration of the diſpoſition *after* the charter and infeſtment followed thereupon, which is the ſubſtance of the reſpondent's libel in this action.

Heads of the Reſpondent's Argument.

However general the maxim pleaded by the appellant may be, yet it has known exceptions, and particularly that it never takes place *ubi agitur aut de obligatione aut de dolo defuncti:* and as this is the opinion of the moſt eminent lawyers, ſo it is moſt reaſonable, for if a perſon happens to get into poſſeſſion of an eſtate by *dolus*, and ſoon after dies leaving his heir a minor, it would be very hard that his minority ſhould protect him from pleading to the action, and prevent the true proprietor from being re-poſſeſſed of his own eſtate, of which he was only diſpoſſeſſed by the father's fraud.

The law, it is true, preſumes in favour of deeds that are complete and duly executed; but this deed has no manner of pretence to that character, as appears from ocular inſpection. The grain and length of the paper of the part added do not agree with the reſt of the deed, and the ſtrokes of the long letters appear upon the ſheet where it was cut off. The laſt ſheet of the deed exactly quadrates with the two ſheets and 13 lines cut off.

All this was perfectly evident from the appellant's father's letter to James the grandfather, which was produced in the action, wherein the whole ſcheme was ſet out, and that the deed as it ſtood originally contained no clauſe of redemption. By this tranſaction a forgery was impoſed upon the witneſſes, who were not witneſſes to the deed as it was altered, at a date as appeared by the letter long ſubſequent to the original execution of it.

The

The appellant alleged a declaration of the grandfather, that he being diſpleaſed with the firſt, had executed a new deed, on which the charter proceeded; and that his father by paying large debts was a purchaſer for an onerous conſideration. But the declaration of the grandfather, who appears to have been a party to the contrivance, was of no import. For the debts paid, the appellant's father took aſſignments in his own perſon; and in ſo far as they are juſt debts, the reſpondent will be obliged to pay them.

After hearing counſel, *It is ordered and adjudged, that the ſaid petition and appeal be diſmiſſed, and that the ſentences or decrees therein complained of be affirmed: And it is further ordered, that the appellant ſhall pay or cauſe to be paid to the reſpondent the ſum of* 40l. *for his coſts in this Houſe.* Judgment 5 April 1712.

For Appellant, *Ja. Mountague.* *P. Crawford.*
For Reſpondent, *Edward Northey.* *Sam. Dodd.*

The letter written by the appellant's father to James the grandfather of the parties, is ſtated by the reſpondent to have been of the following tenor:

"SIR,

"I received by this bearer incloſed in your's the diſpoſition in "favour of your oye James, and according to your deſire, I "have by the aſſiſtance of that perſon you ſignified to me drawn "it as I ſuppoſe to your ſatisfaction, and I have added the "clauſe of redemption as perfectly as I think it will hold in law, "and as you may diſpoſe of your eſtate to any child you have "notwithſtanding of that tailzie. Sir, I was neceſſitated to write "this, to know if you have any further to do in it; for I have "not ended it, waiting to know your commands: and ſince I "cannot have the occaſion of this friend there, ſo let me know "by this bearer, being a ſure hand, as ſoon as poſſible. I add "no more, but deſtroy this line, and reſt,

"Sir,

"Your dutiful ſon and ſervant,

"JAMES CRAWFURD."

"*Edinburgh*, "*March* the 4th, 1696.

Caſe 11.
Fountain-hall, 21 Jan. 16 Nov. 1708. 15 Jan. 9 & 18 Feb. 11 & 17 Nov. 1709. 21 Jan. 3 July, and 8 Dec. 1711. 5 & 16 Feb. 1712. Forbes, 21 Jan. 1708. 21 Jan. 11 Nov. 6 & 14 Dec. 1709. 15 Dec. 1710. 17 Jan. and 8 Nov. 1711.

Adam Cockburn of Ormiſton, one of the Senators of the Court of Juſtice, and Dame Ann his Wife, - - *Appellants;*

John Hamilton of Bangour, a Minor, by his Curators, - - - - *Reſpondents.*

28th *March* 1712.

Lis finita.—After extracting a decreet, with a reſervation therein of ſeveral points, the objection of *Lis finita* and that theſe points were not contained in the original ſummons, is ſuſtained by the Court, but reverſed upon appeal.

Funeral expences.—In a queſtion between the heir and the aſſignee of the executrix of a Lord Juſtice Clerk, 250*l.*, being modified, as ſufficient for funeral expences, the judgment is reverſed.

Preſcription.—Furniſhing to the funeral did not form ſuch a continuation of accounts as to bar the triennial preſcription of accounts incurred before the death of the deceaſed.

Confirmation.—The Court having refuſed to allow to the aſſignee of an executrix in a queſtion with an heir ſerved *cum beneficio*, the expences of an action before them relative to the right of confirmation between the executrix and the father of the heir ſerved *cum beneficio*, the judgment is reverſed.

SIR William Hamilton of Whitelaw, Lord Juſtice Clerk, the appellant Ann's firſt huſband, in 1703 executed a bond *in* her favour for 7000*l.* ſterling, payable at *Whitſunday* or *Martinmas* next after his death. This bond was made a burthen upon his whole eſtate, real and perſonal, but not to affect the heirs of his own body. Sir William having died without iſſue, was buried with great pomp. His ſiſter, Chriſtian Dunlop, was confirmed his executrix; and the perſonal eſtate being inſufficient to ſatisfy the claims of the widow, the executrix aſſigned to her the whole executry, the widow becoming bound to relieve her of the debts, funeral expences, and charges of confirmation, which laſt amounted to a conſiderable ſum, a litigation having been carried on firſt before the commiſſaries, and afterwards before the Court of Seſſion, with regard to the ſame, between Chriſtian, Sir William's ſiſter, and the father of the reſpondent, who was alive at Sir William's death, and his nephew and apparent heir. The reſpondent's father having died, the reſpondent was ſerved heir to Sir William *cum beneficio inventarii.*

The appellants brought an action before the Court of Seſſion againſt the reſpondent for what was due on the ſaid bond, after application of the free perſonal eſtate in part payment thereof, firſt repaying out of ſuch perſonal eſtate, to the appellant Ann, what ſhe had paid to ſundry creditors of the deceaſed, the funeral expences and expences of confirmation.

For thoſe payments the appellants alſo brought an action againſt the executrix, in which laſt action the reſpondent appeared for his intereſt.

A point of law aroſe upon what the appellant Ann had paid to Sir Robert Blackwood and others for furniſhing of goods to the deceaſed before his death, and alſo for furniſhing to his funeral:

the reſpondent contended that theſe furniſhings to the deceaſed were preſcribed, three years having elapſed before they were paid: and the appellants urged, that the ſame parties having furniſhed goods to the funeral of Sir William, this prevented the running of the preſcription by a continuation of accounts. The Court on the 10th of November 1709 found, "that the furniſh- "ing to the funeral of the deceaſed was no continuation of the "currency; and therefore ſuſtained the preſcription as to the "articles furniſhed preceding his deceaſe."

The action proceeding as to the other points, an account of the funeral expences was given in amounting to 421*l.* 8*s.* 7*d.* to this the reſpondent objected as extravagant, and the Court by interlocutor on the 14th of December 1709, "reduced the ſame "to 250*l.*" An account of the expences of confirmation was alſo given in amounting to 100*l.*, which being objected to, the Court by interlocutor on the 15th of December 1710, "re- "fuſed to allow the expences occaſioned by the action before "the Court of Seſſion, relative to the confirmation amounting "to 34*l.*"

Upon thoſe two points the appellants repreſented to the Court, that the extraordinary expences of the funeral, as well as of the confirmation had been occaſioned by the reſpondent's father, then apparent heir of the deceaſed; and of this ſhe offered to make proof, and the Court allowed a proof to both parties.

In the mean time the appellants with conſent of the reſpondent petitioned the Court that after extinction of the bond debt *pro tanto* by the perſonal eſtate, which had come to the hands of the appellant Ann, decree might paſs againſt the reſpondent as heir ſerved to the deceaſed, for thoſe parts of her claims which were wholly uncontroverted, not including any part of the funeral expences, or expences of confirmation; and decree was accordingly paſſed for 2818*l.* 13*s.* 4*d.*, with a reſervation in theſe terms, "reſerving always to the purſuers, to inſiſt for the funeral ex- "pences, and confirmation of the teſtament and other points "not thereby determined as accords," and in theſe terms decree was extracted in September, 1710.

The proofs before mentioned being afterwards finiſhed and reported, the Court by interlocutor in November 1710, "found "that no action of the defender's father, to whom he was "not ſerved heir could affect him."

The reſpondent however when the action had proceeded thus far took up a new defence namely that there was no concluſion in the original libel againſt the reſpondent upon theſe points, and that by extracting the decree before mentioned *lis erat finita*; and the Court on the 29th of June 1711, "found that by the "decree extracted *lis erat finita* notwithſtanding of the reſerva- "tion contained therein."

And afterwards on a petition for the reſpondents the Court on the 28th of November 1711, "allowed him to retain 250*l.* for "his expences out of the heritable eſtate of the deceaſed, ſubject "nevertheleſs to a proportional defalcation in caſe the heritage

" be not *solvendo*, both for debt and expences, and likewise re-
" serving to be determined what expences are neceſſary and profit-
" able in that event."

Entered 22 Jan. 1711-12.

The appeal was brought from " ſeveral decrees orders and " interlocutory ſentences made by the Lords of Seſſion, and par-
" ticularly from the decree or ſentence of the 29th June 1711."

Heads of the Appellants' Argument.

By the ſaid extracted decree, the right of the appellants as to the funeral charges and expences of confirmation was expreſsly reſerved to them; and this reſervation, with the long acquieſcence of the reſpondent, and the appellants, examining witneſſes by order of the Court on theſe points, were a ſufficient anſwer to the objection of *Lis finita*.

But further the appellants brought an action againſt the executrix of Sir William Hamilton, and her repreſentatives after her deceaſe, and the claims for funeral charges and expences of confirmation were a part of the proceſs againſt the executrix to which the reſpondent made himſelf a party by appearing to it, and that action is not *Lis finita*.

With regard to the merchants' accounts found to be preſcribed by the Court, theſe accounts were not only juſtly due by the deceaſed, but the ſame merchants having furniſhed goods to the funeral, within three years of the next preceeding articles in their reſpective accounts, it made ſuch a currency as prevented their being cut off by the act of parliament founded on by the reſpondent.

With regard to the expences of the funeral: Sir William Hamilton from a ſmall fortune, (being his father's fourth ſon) acquired a conſiderable eſtate; and he died not only in the character of a Lord of Seſſion, but alſo of an Officer of State, as Lord Juſtice Clerk, leaving a competent eſtate and no iſſue, and he himſelf cauſed a former wife to be interred in the ſame manner except heralds before he was an Officer of State. The reſpondent's father, too, then living, and Sir William's apparent heir, approved of and ordered the funeral, and all the particulars claimed were paid by the appellant Anne: For theſe reaſons the Court ought not to have reſtricted the funeral expences.

The expences of confirmation were all neceſſarily ſpent by the executrix in defence of her right, againſt the reſpondent's father, who firſt in the Commiſſary Court oppoſed the granting thereof, and not prevailing there carried the matter before the Court of Seſſion, where after a long and chargeable conteſt he was forced to ſubmit. And the appellant Anne actually paid theſe expences of confirmation.

The Court of Seſſion has not only deprived the appellants of their charges and expences, but has on the contrary allowed the reſpondent 250*l.* for coſts or expences out of the heritable eſtate, which was unreaſonable, before the whole claims of the appellants were ſatisfied.

Heads

Heads of the Reſpondent's Argument.

The appellants having brought their action for payment of 7000*l.* 200*l.* of annuity, and 200*l.* for the maintenance of the family (nothing elſe being demanded), judgment was given on all theſe points; and the appellants having poſſeſſed themſelves of all Sir William Hamilton's perſonal eſtate, they gave in an account of the amount thereof, and demanded that the ſame might be entirely imputed towards ſatisfaction of part of the ſaid bond, and that judgment might be given againſt the reſpondent for the remainder. The Court agreed to this, and gave judgment for 2820*l.* 15*s.* againſt the reſpondent, and the decree was extracted: it only reſerved a liberty to inſiſt for funeral expences *as accords*. But this reſervation can import no more, than that what is ſo reſerved, is not deſerted, and may ſtill be ſued for in due and ordinary form. This, however, can never be preſumed to extend the appellants' claim, further than was contained in the action brought by them, or to entitle them to inſiſt upon the former libel and proceſs, wherein decree was extracted, which put an end to that ſuit. It might, otherwiſe, be in the power of a perſon to bring an action for one thing and after having judgment in that to *reſerve* a liberty to aſk another without a new libel, which would be deſtructive of all juſtice as well as form. Though there were afterwards ſeveral debates upon the ſubject of the funerals, yet theſe proceeded only upon the erroneous ſuppoſition, that the appellants had claimed the ſame in their libel againſt the reſpondent; and as ſoon as this was diſcovered to be a miſtake it was proper to go no further.

The action againſt the executrix was merely colluſive, and it is impoſſible that any ſentence can paſs upon that action againſt the reſpondent, becauſe he was not cited or called to it, and his appearance to prevent colluſion does not make him a party. Neither has that ſuit any connection with this, and therefore it can be no part of the action at the inſtance of the appellants againſt the reſpondent. The expences of confirmation could not regularly be brought into that action, becauſe they were laid out by the executrix herſelf, and were not aſſigned by her to the appellant Anne, and therefore the executrix could not be ſued for them. As to the funeral charges they were not in the original libel, either againſt the reſpondent or the executrix, nor could they be ſo, becauſe the appellant had not paid them, (at leaſt for the greateſt part) till long after the commencement of the ſaid actions.

By the act of parliament 1579. c. 83. it is enacted that, "all "actions of debt, for houſemails, &c. be purſued within three "years, otherwiſe the creditor ſhall have no action except he "either prove by writ, or by oath of his party." This law is very poſitive and plain, and howſoever it has been extended in ſome caſes by the Court of Seſſion, yet it never was interpreted ſo, as contended for by the appellants, that the furniſhing to the funeral ſhould ſtop the preſcription eſtabliſhed by this act eſpecially when theſe furniſhings were neither by order of the heir or executrix. 1579. c. 83.

With regard to the expences allowed to the reſpondent,—by the ancient law of Scotland, an heir was obliged in payment of all his predeceſſor's debts, though ten times more than the eſtate deſcending to him; though executors were only liable ſo far as they had *aſſets*, provided they gave up an exact inventory of all the goods and effects of the deceaſed. This privilege, the parliament of Scotland in 1695 likewiſe extended to heirs: and the heir in this caſe was called *heres cum beneficio inventarii*, and in theſe terms was the reſpondent heir to Sir William Hamilton. The appellants having obtained judgment for 2820*l.* ſterling, ſued it to execution upon Sir William's heritable eſtate, and the reſpondent thereupon repreſented to the Court, that he being heir *cum beneficio inventarii*, was only accountable for what he had received; that he was willing to aſſign Sir William's whole eſtate for ſatisfaction of the appellant's demand, reſerving to him ſo much of the ſaid eſtate as would anſwer the expences laid out by him in managing and defending the eſtate. As executors had certainly an allowance for their neceſſary expences, and as heirs were by the ſaid act in the ſame condition with them, they ought to have the ſame privilege; otherwiſe, neither heirs nor executors would put themſelves to any expence to manage and defend an eſtate from unjuſt claims.

1695, c. 24.

Though this claim was ſo reaſonable, yet there never having been any adjudged caſe upon the point, the Court of Seſſion proceeded very cautiouſly, and did not preciſely determine the queſtion of the reſpondent's expences, but only reſerved the ſum of 250*l.* proviſionally as a fund for them, out of which they might allow the heir his neceſſary expences, if they ſhould think that in law they ought to be allowed, and ſtill left themſelves at liberty to determine what expences were neceſſary; but in all probability the caſe will never exiſt, becauſe the eſtate will amount to more than ſufficient to pay the debts; and it was therefore unreaſonable in the appellants to bring their appeal againſt a ſentence which is not final, and does not determine the queſtion between the parties, but is ſtill ſubject to review.

Judgment 2 March, 1712.

After hearing counſel, *it is ordered and adjudged, that the ſaid ſentence of the* 29th *of June* (1711), *declaring the ſuit to be* Lis finita *be reverſed; and it is further ordered and adjudged, that the appellants be at liberty to inſiſt or proſecute in the ſaid ſuit or proceſs for all the expences of the funeral, above the ſum of* 250l. *to which the ſame were reduced by the Lord Ordinary, as well as for the ſaid ſum of* 250l., *and as well for the extraordinary as for the ordinary coſts and expences touching the adminiſtration or confirmation of the teſtament of the deceaſed, and that ſuch ſeveral ſums as ſhall appear juſt to have been allowed or deducted out of the perſonal eſtate for ſuch funeral expences, and for ſuch ordinary and extraordinary coſts and expences touching the adminiſtration or confirmation of the ſaid teſtament ſhall be taken as remaining due upon the bond bearing date the* 5th *day of March* 1703, *and be computed with intereſt from ſuch time as the money ſecured by the ſaid bond became payable until the payment thereof, and*

and ſtand as a charge upon the heritable eſtate; but as to the interlocutory ſentence in November 1709, *for ſuſtaining the bar of preſcription, whereby the appellants were not allowed to make any deduction out of the perſonal eſtate for ſeveral of the deceaſed's debts paid by the appellants to Sir Robert Blackwood and others, ſuch debts being merchants accounts and adjudged barred or preſcribed by the ſtatute of King James the* 6th, *as not being ſued for in three years, the ſaid interlocutory ſentence is hereby affirmed: and as to the interlocutory order made the* 28th *of November laſt, touching the reſpondent's coſts, the ſame is hereby remitted to the Lords of Seſſion to reconſider the ſame, together with the ſaid demands of the appellants touching the funeral expences, and the ſaid coſts and expences, touching the adminiſtration or confirmation of the ſaid teſtament, and determine thereupon as ſhall be juſt.*

For Appellants, *Tho. Powys. Rob. Raymond.*
For Reſpondent, *David Dalrymple. Sam. Dodd.*

Part of the Judgments here reverſed, are founded on as exiſting cases in the Dictionary vol. I. voc. *Funeral Charges*, p. 338. and vol. II. voc. *Perſonal and tranſmiſſible*, p. 74.

John Hamilton, of Pumpherſton, Eſq. - *Appellant*; Caſe 12.
Katherine Lady Cardroſs, - - - *Reſpondent.* Fountainhall, 20 Feb. 1708. 2 January 1711. Forbes, 20 Feb. 1708.

8th *April* 1712.

Minor.—A tack ſuſtained, which, in the recital, bore to be granted by a Minor with conſent of his Curators, but was ſigned by the landlord only.

Homologation.—In a reduction of a Tack on the ground of nullity, it being found that the receipt of the rent by the Grantor's heir for more than 30 years, imported no homologation, the Judgment is reverſed.

IN 1671, Sir William Stewart, of Kirkhill, the reſpondent's brother, let to Alexander Hamilton the appellant's father, then his factor or baillie, the lands of Strathbrock for the term of three 19 years, at the rent of about 50*l.* annually. The tack in the recital bore to be granted by the ſaid Sir William, with the conſent of his curators, but it was ſubſcribed only by himſelf.

Sir William died ſome time after the date of this tack. but the preciſe date of his death does not appear. The reſpondent, his ſiſter, ſucceeded to his eſtates; and the appellant's father and the appellant himſelf poſſeſſed their farm in virtue of the ſaid tack, without challenge for more than 30 years; and part of the rents had been paid, (as ſtated by the appellant) to Sir William before his death, and the remainder regularly to, or for the uſe of the reſpondent.

In 1706 the reſpondent commenced an action before the Court of Seſſion againſt the appellant, to remove him from the poſſeſſion of the ſaid lands, on the ground, that his tack was void being granted by Sir William Stewart when a minor, with-

out conſent of his curators. And to prove the minority the reſpondent produced a certificate of his baptiſm, and ſeveral deeds executed by him, both before and after the date of the ſaid tack, with conſent of his curators, to one of which, the appellant's father was a ſubſcribing witneſs; and ſhe founded upon the tack itſelf, which bore conſent of curators, though none were ſubſcribing (*a*).

The appellant made defences to this action, and the Court on the 20th of February 1708, "ſuſtained the nullity againſt the "ſaid tack, the ſame not being ſigned by the minor's curators."

The appellant having ſtated objections to the proof of minority, and of Sir William's being under curatory, and pleaded homologation, the Court on the 15th of July 1708, "found that the "diſcharges for the rent did not import any homologation, "acknowledgment or confirmation of the tack for the time that "was to run thereof." And on the 16th of July 1708, "decerned againſt the defender in the removing."

Entered, 11 February 1711-12.

The appeal was brought from "an interlocutor or decree of "the Lords of Council and Seſſion, made on behalf of Katherine "Lady Cardroſs, the 20th of February 1708, and of an inter-"locutor pronounced the 15th of July 1708, and of one other "interlocutor pronounced the 16th of July 1708, whereby the "appellant was decreed, to quit his poſſeſſion of the lands "therein mentioned."

Heads of the Appellant's Argument.

There was no direct or legal proof of Sir William Stewart's minority, which ought certainly to have been clearly proved; the certificate of his baptiſm could be no proof, as leaving the time of birth uncertain. Nor could deeds executed by him, with conſent of his curators, be in law a ſufficient proof, that he had ſuch curators ſo as any deed done without their conſent ſhould be void. For there are two kinds of curators: the firſt are ſuch as are legally choſen and authorized by a judge upon the minor's ſpecial choice; theſe curators having accepted, any deed done by the minor without their conſent is void. But there are a ſecond kind of curators, otherwiſe called procurators, who without any legal choice, but the conſent of the minor, act as curators; but their acting does neither validate, nor does the want of their conſent invalidate any deed done by the minor. It is, therefore, to be preſumed, that the curators who appear to have conſented to any of Sir William's deeds were of this laſt ſort, unleſs it had been proved that they were otherwiſe legally authorized, which the

(*a*) The papers and vouchers produced by the reſpondent are ſtated by Forbes to have been—Certificate of Sir William's baptiſm in 1652; a ſuſpention and ſummons in 1666, an act and commiſſion in 669; a ſummons in 1670, a charge in 1671, and a ſummons in 1672, all at the inſtance of Sir William Stewart and his curators; with a tack and factory in 1667, ſubſcribed by him and them, to which two deeds the appellant's father was a ſubſcribing witneſs, and a regiſtered factory in 1672 executed by the ſame parties. She produced alſo a certificate under the hand of the Commiſſary clerk of Edinburgh, that Sir William's act of curatory ſtands in the minute book 8th May 1667, and a receipt for the act of curatory itſelf in 1671.

reſpondent

respondent ought to have proved, seeing *actori incumbit probatio.* Nor is the appellant's father's being a witness to the deeds in 1667 executed by Sir William and his curators any proof of the minority; for Sir William might then indeed have been a minor, and of lawful age in 1671; a witness to any deed is not obliged to know what is contained in it.—And though the tack to the appellant's father bears to be with consent of curators, and none of them sign, yet that might either proceed from this; that at the time the tack was drawn Sir William was not of age, but might be so before it was executed; or that the tenant finding they were only procurators thought their consent of no force;—and though he lived, as is agreed on all hands some time after he came of age, yet he never called this tack in question, but received the reserved rent thereof during his life (*a*). The tenant, then, needed not the consent of the curators to attain possession, because he had been many years possessed of the lands let; nor to validate the deed, for the first payment to the landlord did bar all exception of nullity and behoved to confirm the tack. And in the present case every thing ought to be presumed favourably for the rusticity of the tenant.

In a reduction of this kind lesion must be proved; but though the minority had been clearly proved, yet the tack being granted at as high, if not a higher rent than before, the landlord suffered no loss by it. These lands would not answer at the appellant's father's entry, but he having ameliorated their condition at considerable expence, they came at last to be productive; but the tenant would still be a considerable loser should he at present be deprived of his tack.

As Sir William Stewart never called the tack in question during his life, so the respondent his heir who succeeded to her brother in 1674, though she knew of the tack, yet acquiesced in it till 1706, when the present action was commenced, having all the while received the reserved rents yearly and granted acquittances for the same. The appellant produced to the Court a general discharge from the late Lord Cardross, the respondent's husband deceased, dated the 26th of December 1674, for the year 1673, and all preceding, which included the rent for the first year of the tack; and this discharge mentions that an account had been made, and presumes that the vouchers for the preceding years were given up to the respondent, or to her husband. The silence, therefore, of the respondent during so long a period is an undoubted confirmation of the tack, whereof she is presumed to have known the terms and condition: and the civil law in nullities of the same kind, did not only construe such silence to be a confirmation so as to supply any defect; but Justinian by an edict, expressly declares "that if in five years no question be moved by the grantor, nor his heir, that silence shall be held as a confirmation. Cod. L. 5. Tit. 74. And the learned Perez observes, that according to the general custom, such question must not only be Cod. L. 5. Tit. 74.

(*a*) There does not appear to have been any direct proof of this averment.

moved in five years, but finally decided in ten; whereas this leaſe has ſtood unqueſtioned for 37 years.

Heads of the Reſpondent's Argument.

By the law and uncontroverted uſage of Scotland, all deeds done and executed by minors before their full age of 21, without the advice and conſent of their curators, are ipſo jure null and void. And in every act and deed that is to be obligatory upon a minor, the conſent of ſuch curators muſt be teſtified by their ſubſcribing the deed along with the minor in preſence of *famous* witneſſes.

By the law of Scotland a perſon's right of quarrelling an inſufficient and illegal deed is nowiſe cut off or weakened by delaying it, unleſs they let it run up to 40 years complete, which is not pretended in this caſe.

The reſpondent ſufficiently proved, by the deeds and other documents produced by her, that Sir William Stewart was a minor having curators, at the date of the tack in queſtion; and the appellant's father, then his factor, did moſt unwarrantably prevail upon him, without the knowledge or conſent of his curators, to grant this tack for three 19 years, at a rent more than one third under the true value. This fact is evident becauſe the appellant, having, in conſequence of the decree of the Court below, been removed from the poſſeſſion of the farm, the reſpondent granted a new tack to another tenant for a term of 11 years, at above 30*l.* per annum more rent.

Sir William never received any rent after he attained his full age of 21 years, and he died within four months after that period; and if the appellant has any diſcharges from the reſpondent for his rent, they do not mention the tack. But if they did, they cannot validate the ſame, being abſolutely null and void.

Judgment, 8 April 1712. After hearing counſel, *It is ordered and adjudged, that the ſaid interlocutors, decree, and orders complained of in the appeal, be reverſed, and that the Lords of Seſſion do order the appellant to be forthwith reſtored to the poſſeſſion of the ſaid lands, and to have ſatisfaction for what he has loſt in reſpect of the profits of the ſaid lands, by reaſon of the decree orders and interlocutors hereby reverſed.*

For Appellant, *Samuel Dodd.*
For Reſpondent, *Pat. Turnbull, Paul Jodrell, jun.*

In the printed appeal caſes in this queſtion, another point is ſtated, which it was deemed unneceſſary to detail. After the date of pronouncing the *laſt* interlocutor here appealed from, the appellant applied to the Court to be indemnified for certain improvements made by him and his father, and the Court found that the expences of amelioration were, mala fide, laid out and ſufficiently compenſated by a 30 years poſſeſſion. But it does not appear from the judgment in this appeal, that this laſt mentioned part of the judgment of the Court of Seſſion was appealed from: and the reverſal upon a preliminary point renders the judgment of the Court of Seſſion thereon of no effect. It is however ſtated as a precedent in the Dictionary, vol. I. voc. *Bona fide conſumption*, p. 108.

William Forbes of Tolquhon, - - *Appellant*; Alexander Forbes of Ballogie. - - *Reſpondent*.

Caſe 13.

Fountainhall, 2 Jan. 1711.

10th *April* 1712.

Fraud and Circumvention.—In a reduction of ſundry deeds upon this ground, various circumſtances found irrelevant or not proved.

SIR Alexander Forbes of Tolquhon, deceaſed, the appellant's uncle, had various tranſactions and dealings with the reſpondent; in the courſe of which ſundry deeds were granted by the former in favour of the latter, which form the ſubject of the preſent queſtion.

In October 1694, Sir Alexander granted bond for repayment to the reſpondent of 10,000*l.* ſcots, which the bond recites to have been borrowed from him. On the 4th of September 1697, Sir Alexander further executed a diſpoſition in favour of the reſpondent, diſponing to him, his heirs, and aſſignees, heritably and irredeemably all his right, title, and intereſt in, and to the lands of Loanmay; and the deed recites, that the ſame was granted for onerous conſiderations. On the 16th of May 1699, Sir Alexander by another diſpoſition executed by him in favour of the reſpondent, diſponed to him, his heirs, and aſſignees, heritably and irredeemably all his right, title, and intereſt in and to the lands of Shives; and this deed alſo recites, that it was granted for onerous conſiderations. To theſe lands of Loanmay and Shives, Sir Alexander's own titles were not clear, there being great incumbrances upon the ſame. And he alſo by ſundry deeds, conveyed to the reſpondent ſeveral adjudications and other incumbrances which he had upon theſe and other lands.

Various reports being circulated in the country reſpecting theſe tranſactions, Sir Alexander, on the 2d of September 1699, executed a deed ratifying and confirming to the reſpondent the ſaid 10,000*l.* bond, and all his right, and title, to the ſaid lands of Loanmay and Shives, and declaring that the diſpoſitions thereof, were not in ſatisfaction of the bond, or any part thereof, but that the bond ſtill remained due and unpaid: And further on the 7th of February 1700, Sir Alexander by another deed, did diſclaim and renounce to the reſpondent, his heirs, and aſſignees, all truſt which might be alleged againſt their rights and titles to the ſaid lands of Loanmay and Shives. Theſe lands had been purchaſed and acquired by Sir Alexander himſelf.

On the 4th of December 1700, Sir Alexander by a diſpoſition executed by him, diſponed to the reſpondent, his heirs, and aſſignees, heritably and irredeemably his lands of Upper Tolquhon, (being part of the family eſtate); and the reſpondent of the ſame date executed a back bond in Sir Alexander's favour, declaring that this diſpoſition was made to him only as a ſecurity for ſuch debts, as were therein mentioned, for which the reſpondent ſtood bound; and that upon payment thereof, the reſpondent,

reſpondent, his heirs, and aſſignees, would reconvey to Sir Alexander and his heirs.

On the 18th of April 1701, Sir Alexander executed an entail of his family eſtate, including the lands laſt mentioned, with the incumbrance thereon, in favour of the appellant, and certain other heirs, the reſpondent being one of the ſubſtitutes therein.

About this period, Sir Alexander was challenged by one Thomas Forbes of Watertown, with having made irredeemable conveyances of his eſtates to the reſpondent; but he denied the ſame, and entered into a written contract of wager, with this Thomas Forbes, denying that he had given irredeemable rights of his lands to the reſpondent, and obliging himſelf to pay 1000*l.* ſcots, if theſe deeds were irredeemable, and he was to receive a like ſum, if they were found to be only upon truſt and ſecurity.

After this, on the 24th of June 1701, Sir Alexander executed his laſt will and teſtament, ſetting forth among other things, that he had granted the aforeſaid bond for 10,000*l.* and diſponed the lands of Loanmay and Shives, to the reſpondent for onerous conſiderations, and that he had made the diſpoſition of the Upper lands of Tolquhon to the reſpondent for his ſecurity and indemnity; and he thereby appoints ſeven gentlemen to be curators, to the appellant, the reſpondent bein *ſine quo non*, and named the reſpondent and two other perſons to be his executors. He died ſoon after on the 31ſt of July 1701, at the age of 77 years.

The appellant being a minor at the time of his uncle's death, when he came of age in 1706, brought an action before the Court of Seſſion for reduction of the bond and deeds granted in favour of the reſpondent, as having been obtained by fraud and circumvention, when the grantor had loſt his judgment, and when the reſpondent could not inſtruct the onerous conſiderations thereof. On theſe points the Court allowed the parties a joint proof, and many witneſſes were examined on either ſide. After hearing this cauſe, and conſidering the proof adduced, the Court by interlocutor on the 2d of January 1711, "repelled the "whole reaſons of reduction of the writs libelled and produced, "as irrelevant or nor proved." The appellant reclaimed, but on the 8th of February following the Court adhered to their former interlocutor.

Entered, 13 Dec. 1711.

The appeal was brought from "an interlocutory ſentence or "decree of the Lords of Counſel and Seſſion, pronounced the "2d day of January 1710-11, and the affirmance thereof."

The qualifications of fraud inſiſted on by the appellant were, that Sir Alexander Forbes had had a free eſtate of £10,000 Scots *per annum*; but that before his death, being old and infirm, he gave himſelf up to the management of the reſpondent and a houſekeeper; and though he lived penuriouſly, he contracted in that period great debts, and executed in the reſpondent's favour the deeds before mentioned: that it appeared from the contents of theſe deeds and the contract of wager that he was ignorant of their import: that, by the reſpondent's means, the letters of his relations were kept back, and acceſs denied to them: that his memory and judgment were de-

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cayed in so much that he did not know his oldeſt friends: that he would have craved his tenants for rents paid only the day before, &c.

The reſpondent anſwered, that the deeds bearing to be for onerous cauſes proved their recitals, unleſs the contrary was proved: that Sir Alexander was ſhort ſighted, of a very peculiar humour, and always craved his tenants for rent when he ſaw them: that the appellant's witneſſes were perſons of inferior degree, but that the reſpondent had proved by noblemen, gentlemen, and other perſons of probity, that Sir Alexander converſed with them as rationally as ever, during the period in queſtion.

After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the ſentence or decree and the affirmance thereof complained of in the ſaid appeal be affirmed.* Judgment, 10 April, 1712.

For Appellant. *Edward Northey, Sam. Dodd.*
For Reſpondent. *Robert Raymond, David Dalrymple.*

William Dunbar, ſecond Son of Sir William Dunbar of Durn, - - - - *Appellant*;
Colonel John Erſkine, - - - *Reſpondent.*

Caſe 14.

16th *May* 1712.

Act of Parliament 1693, *c.* 9.—The accounts of a magazine keeper, taken and verified in terms of this act, need not be verified anew before the Court of Seſſion.

Expences.—Expences of the Court below given againſt a Reſpondent.

THE Privy Council of Scotland, in 1690, by a proclamation ordained the Commiſſioners of Supply to furniſh forage for the forces, then ſtationed in the ſeveral counties, to prepare magazines for keeping the ſame, and to appoint the Collectors of Supply to be magazine keepers. The appellant was Collector of the Supply and magazine keeper, for the county of Banff.

More money having been advanced in ſome parts of the kingdom for forage, than was due on account of the ſupply, in 1693, an Act of Parliament was made for diſcharging the ſame, and the method of proceeding and determining upon claims was laid down by that act. 1693. c. 9.

In conſequence thereof applications were made to a committee of the Privy Council, on behalf of the freeholders of the county of Banff, and by the appellant who gave in a claim for 1727*l.* 3*s.* 10*d.* ſcots, due to him as magazine keeper. There being ſome difficulty in ſettling the proportions due to the ſeveral freeholders of the county for their furniſhings, Sir James Abercromby and Mr. Duff, their two repreſentatives in parliament, to whom they had given authority to act for them, aſſigned and made over the whole arrears, due for the county of Banff, to the reſpondent, amounting to the ſum of 6200*l.* ſcots, in which was included the 1727*l.* 3*s.* 4*d.* claimed by the appellant with a power to receive the ſame.

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The reſpondent ſolicited this buſineſs before the Privy Council; and among other claims, that ſtanding in the name of the appellant, was approved of by the Committee of Privy Council, who had the examination of the ſame. After a report made by their Committee, the Privy Council on the 5th of December 1695, recommended to the Commiſſioners concerning the *Poll-Money* appointed by the ſaid act 1693, to make payment, among others, to the appellant of the ſaid ſum of 1727*l.* 3*s.* 10*d.* out of the Poll-Money. On the 6th of January 1696, theſe Commiſſioners did upon the ſaid act of Privy Council, indorſe their precept or bill directed to George Baillie of Jerviswood, then receiver general, "to pay out of the Poll-Money to Lieutenant Colonel John "Erſkine the ſum of 1727*l.* 3*s.* 10*d.* contained in the within act, "for the uſe and behoof of William Dunbar, magazine keeper "in Banff." And the reſpondent gave his receipt for the ſame, under the precept.

The reſpondent alſo received the other arrears due to the county of Banff, and he accounted for the whole ſum to Sir James Abercromby and Mr. Duff before mentioned, who again paid to, or accounted for, the whole ſum to the Commiſſioners of Supply for the county, including the 1727*l.* 3*s.* 10*d.* which had been ſtated in the appellant's name; and theſe Commiſſioners on the 19th of March 1700, granted a diſcharge to Sir James Abercromby and Mr. Duff, and obliged themſelves to warrant them from all actions that could be brought againſt them on that account.

In 1704, the appellant brought an action againſt the reſpondent, before the Sheriff of Edinburgh, for payment of the money received in his name as aforeſaid; the reſpondent made objection to the juriſdiction of the Court, but the Sheriff gave his decree againſt the reſpondent, for the ſaid principal ſum of 1727*l.* 3*s.* 10*d.* with intereſt and 120*l.* ſcots of expences. In theſe terms the decree of the Sheriff was extracted, and a horning thereon executed againſt the reſpondent.

But the latter afterwards preſented a bill of ſuſpenſion to the Court of Seſſion, and on the 26th of February 1706, the Court, "found the letters orderly proceeded, and decerned the ſame to "take effect, and to be further proceeded in, until the reſpon- "dent ſhould pay to the appellant 1727*l.* 3*s.* 10*d.* of principal "with intereſt from January 1696; but ſuſpended the execution "as to the expences, ſimpliciter: and of conſent of parties pro- "curators ſiſted all execution upon the ſaid decreet, till the "Lord Ordinary ſhould give orders in writing for doing diligence "thereon, and allowed the ſuſpender to retain in his own hands, "200 merks ſcots paid to the charger by Alexander Duff, who "was cautioner for the ſuſpender in the ſuſpenſion;" and in theſe terms the decreet was extracted.

The ſiſt having been made upon the idea of an accommodation between the parties, when that was laid aſide, the appellant applied to the Lord Ordinary, to have the ſiſt taken off, and after ſundry proceedings, and a hearing in preſence, the Court on the

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3d of January 1708, "declared they would hear the matter upon "the material juſtice of the cauſe, and remitted it to the Lord "Ordinary to hear and determine, or report."

The Lord Ordinary after hearing parties, ordered the proclamation concerning the keeping of magazines and furniſhing of troops, and the books kept touching the ſame, and alſo the account of furniſhing, and loſſes for the ſhire of Banff, concerning the ſaid furniſhing ſtated and approved by the Privy Council, with their order upon the Commiſſioners of the Poll-Money, to be produced by the appellant. The appellant oppoſed this production, and after a report from the Lord Ordinary, the Court on the 15th of July 1709, "found that whoever did furniſh proviſions "and provide magazines for the forces, and inſtructed the ſame "in terms of the act of Parliament, ought to have the money "purſued for; and remitted it to the Lord Ordinary to hear the "parties upon the point of furniſhing the proviſion and maga-"zines, and to determine or report; and in caſe the parties con-"tenders could not inſtruct the furniſhing and providing, ordain "the money to be conſigned in the clerk to the proceſs hands."

And on a reclaiming petition with anſwers, the Court on the 26th of July 1709, "found that the ſaid decree was no definitive "ſentence, and adhered to their former interlocutors, with this "quality, that regard ought to be had the charger's expences "in managing the magazine."

The appeal was brought from, "a decree of the Lords of "Council and Seſſion, made on or about the 26th day of "February 1706, and an interlocutory order in the ſame cauſe, "on or about the 15th day of July 1709, for ſtay of execution "upon the ſaid decree." Entered January 31, 1711-12.

Heads of the Appellant's Argument.

The appellant's account for forage truly ſupplied by him, was ſtated to and allowed by the Commiſſioners of Supply; and it was afterwards reviſed, verified, and approved by and before the Committee of the Privy Council, and the Lords of the Privy Council, who by the ſaid act 1693, concerning the Poll-Money were empowered, and had authority to decide and determine finally all queſtions and difficulties, which were by the ſame act undetermined, or which might ariſe touching the matters therein mentioned, approved of the report of their Committee, and what they did was purſuant to the authority given by parliament. The Court of Seſſion therefore had no authority to decree any account to be taken touching the ſaid magazines and proviſions; the decree extracted in this caſe was a definitive ſentence, according to the articles of regulation concerning the Seſſion, purſuant to an act of parliament in 1693, entitled *Commiſſion for regulation of Judicatories.* 1693, c. 34.

The reſpondent, in receiving the money in queſtion was a truſtee for the appellant and had no manner of intereſt therein, nor any juſt reaſon to withhold the ſame from the appellant, which he hath done above 16 years, and hath occaſioned the appellant's

ſpending, in charges relating thereto, more than the ſaid money decreed to him.

Heads of the Reſpondent's Argument.

The appellant himſelf never furniſhed any corn or ſtraw towards the ſaid magazine, but being keeper of the books of furniſhing, inſtead of ſtating the accounts for furniſhing, as due to the ſhire, or to the ſeveral furniſhers, he ſtated them as due to himſelf; and the reſpondent received the money from the receiver general, in conſequence of an aſſignment made in his favour by the repreſentatives in parliament for the county of Banff, and not in virtue of any authority from the appellant himſelf.

The ſiſt which was agreed to by the conſent of both parties, ought not to have been taken off, till a fair account were taken; it being unreaſonable that the appellant's word only ſhould be taken inſtead of regular and proper vouchers; which vouchers if he could produce would certainly be allowed, but it would be moſt unreaſonable, that becauſe the appellant who had the books in his own hands, and made up the accounts in his own name, though he had not furniſhed any thing, ſhould by ſuch means deprive the freeholders of their right who had actually furniſhed the ſame, and in truth and fact, if the appellant is obliged to produce vouchers for his furniſhing it will appear plainly, that he had none, or at leaſt very ſmall intereſt in this money, and never was any money out of pocket in furniſhing or providing corn and ſtraw for the magazine, the ſame having been really furniſhed by the freeholders of the county.

Judgment, 16 May 1712.

After hearing counſel, *It is ordered and adjudged, that ſo much of the ſaid decrees orders and interlocutors, as are complained of in the ſaid appeal, and made in this cauſe, whereby the appellants execution was ſtayed, be reverſed and ſet aſide; and that the Lords of Council and Seſſion in Scotland, do order execution to be forthwith iſſued for the ſum of* 1727l. 3s. 10d. *ſcots money decreed to the appellant William Dunbar and for* 120l. *ſcots money coſts, decreed to the appellant by the Sheriffs of Edinburgh, and that the Lords of Council and Seſſion do alſo forthwith order intereſt to be computed and paid for the ſaid ſum of* 1727l. 3s. 10d. *ſcots money, for the time the ſame came into the hands of the reſpondent Erſkine, until the ſame ſhall be paid back to the appellant, and alſo that the appellant ſhall have his full coſts for all his ſubſequent proceedings before the ſaid Sheriffs, and Lords of Council and Seſſion, ſince the taxation of his coſts by the ſaid Sheriffs, and that execution be alſo forthwith iſſued for ſuch intereſt, and ſubſequent coſts, after diſcounting of the ſum of* 200 *merks paid to the appellant by Alexander Duff, and mentioned in the decree by the ſaid Lords of Council and Seſſion, and that the ſaid Lords of Council and Seſſion do order the ſame to be done accordingly.*

For Appellant, *P. Crawford, Ro. Forbes.*
For Reſpondent, *Rob. Raymond, P. King.*

Sir Patrick Home, Baronet, - - *Appellant*;
Sir Robert Home, Baronet, - - *Reſpondent*.

Et e Contra.

Caſe 15.

Fountainhall, 24 June, 1 Dec. 1698. 12 January, 5 July 1699. 7 July 1702. 10 Feb. 17, July, 17, Dec. 1708. 21 Nov. 1711. Forbes, 16 July, 1708.

27th *May* 1712.

Fraud and Circumvention.—Circumſtances ſufficient to reduce deeds upon this ground. Being ſo reduced they ſtand as a ſecurity only for the onerous cauſes thereof.

Inhibition.—By marriage contract the huſband is bound to reſign the eſtate to himſelf, and the heirs male of the marriage, and inhibition being uſed thereon he was diſabled to diſpoſe of that eſtate gratuitouſly, in prejudice of the heir male of the marriage.

Repreſentation.—This heir male being ſerved *Hæres maſculus et proviſionis* to his father is found liable by the Court to warrant his father's deeds, but the judgment is reverſed.

Truſt.—A ſecond Son having accepted from his father a tack of the eſtate for payment of debts and having afterwards taken a diſpoſition of that eſtate from his elder brother, the truſtee is obliged to count and clear the onerous cauſe of this diſpoſition, at the ſuit of the ſon of the ſaid elder brother, (whom the Court had found to be *heir-male*.)

SIR John Home of Renton, Baronet, deceaſed, had two Sons, firſt Alexander, (afterwards Sir Alexander) the father of Sir Robert, party in theſe appeals, and ſecond Patrick, (afterwards Sir Patrick) the other party therein.

On the 30th of September 1670, Sir John executed a ſettlement or entail of his lands and eſtates, upon his eldeſt ſon and the heirs therein mentioned; but not having been regiſtered, and no infeftment having been taken thereon, it was after Sir John's death cancelled or deſtroyed by his ſon Sir Alexander; and the preciſe terms of it are not agreed upon by the parties. On the 6th of October thereafter, Sir John executed a diſpoſition or conveyance of his whole unentailed and perſonal property to his ſaid ſon Alexander, upon the following recital. "And ſeeing by "diſpoſition of tailzie dated the 30th of September laſt, I have "diſponed my lands, &c. to Alexander Home my eldeſt ſon, &c. "therefore wit ye me, for the better and more effectual "payment of my debts, that my lands, living, and eſtate may be "diſburthened of the ſame, to have given, granted, and diſponed "to the ſaid Alexander Home, with the reſervations, conditions, "and limitations after mentioned;" then follows the enumeration of the particulars conveyed, and the conditions of the conveyance, that Alexander Home ſhould be bound by his acceptance to ſell ſuch part of the ſubjects conveyed, as conſiſted in lands apprized, or taken in execution for debts, and alſo ſuch part thereof as conſiſted in moveables, and to do exact diligence for recovering debts due to Sir John, and to apply the price of ſubjects ſold, or money recovered within year and day after Sir John's death in payment of debts, and that the ſaid Alexander Home ſhould have no power to diſpoſe of any part of the ſaid entailed eſtates, till the unentailed and perſonal eſtate was ſold, and applied for payment as aforeſaid; and Alexander was further diſabled

diſabled from diſpoſing of the ſaid perſonal and unentailed eſtat or any part of it otherwiſe than as aforeſaid, or to do any dee whereby it might be affected or evicted; and if the ſaid Ale ander ſhould act contrary therto, then his right was to becon void, and the right of the whole was to devolve on Sir Patric for the ſame ends and purpoſes.

On the 13th of May 1671, Sir John further executed a lea of his entailed eſtate, in favour of his ſecond ſon Sir Patrick, wh was then an advocate, expreſſing the cauſe to be for payment o his debts, and children's portions, that his entailed eſtate migh be diſburthened, to commence from the next term after Sir John decaſe, and to continue five years, and ſo from five years to fiv years, till the whole of the debts and portions ſhould be paid the ſaid Sir Patrick paying yearly to Sir John's relict 88*l.* 17 ſterling, to Alexander the eldeſt ſon 111*l.* 2*s.* ſterling, and apply ing the ſurplus for payment of debts and children's portions; an Sir Patrick was thereby bound to count and reckon yearly for hi intromiſſions, at the ſight of Charles Maitland of Hatton, after wards Earl of Lauderdale, and George Home of Kaimes, Sir John's brother. Sir Patrick was thereby alſo to have deductio of what expences he ſhould be at not only in managing the ſai entailed eſtate; but alſo all charges and expences which h ſhould be at in purſuing or defending any action or plea at law o account of the ſaid eſtate, or in purſuing or defending any actio competent to, or that might be moved againſt Sir John's heirs and ſucceſſors.

Sir John died ſoon after in July 1671, and Sir Patrick entere to poſſeſſion of his landed eſtate, by virtue of the ſaid leaſe. On the 28th of Auguſt 1671, Sir Alexander by a deed in which Sir Patrick joined him, conveyed the bulk of the unentailed and per ſonal eſtate, conſiſting of an appriſing upon the eſtate of John Renton of Lammerton, for the ſum of 1243*l.* ſterling principa money, 1800 ſheep, 280 lambs, 50 oxen, 25 milk cows, 3 bulls 10 calves, 21 horſes, 50 bolls of wheat, 110 bolls of barley, and 310 bolls of oats, to the ſaid George Home of Kaimes, in ſecurity to him of a certain debt due to him, and for his relief from certain other debts, wherein he was cautioner, for and with the ſaid Sir John Home.

Diſputes ariſing between the brothers Sir Alexander and Sir Patrick, Sir Alexander in 1673 brought an action of count and reckoning againſt Sir Patrick before the Court of Seſſion; and after various proceedings in that action, the Court on the 23d of December 1675 allotted part of the eſtate to Sir Alexander, for payment of his annuity, and ordered the count and reckoning to proceed.

On the 27th of April 1678, a contract was executed precedent to the marriage of Sir Alexander Home, with Margaret the daughter of Sir William Scott, then deceaſed, whereby in conſideration of that marriage and of 10,000 merks, the portion of the ſaid Margaret Scott, Sir Alexander obliged himſelf to ſettle an annuity of 2000 merks, out of the ſaid eſtate upon his lady, and

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to ſettle the lands, and baronies belonging to him, upon himſelf and the heirs male of that marriage. And on the 21ſt of July 1690, a ſettlement to that effect was executed by Sir Alexander with concurrence of the perſons named in the contract of marriage, at whoſe inſtance execution was appointed: this ſettlement was regiſtered, and inhibition ſerved thereon againſt Sir Alexander.

The action of Court and reckoning mean time proceeded without intermiſſion, and in July 1694, when it had already laſted 21 years, Sir Patrick was not brought to a final account: but the rental of the eſtate and all other proofs being made and conſidered, the Court remitted the account to be ſtated by the Lord Ordinary in the cauſe, in order to their final decree.

While matters remained in this ſituation on the 31ſt of October 1694, juſt before the Seſſion began, Sir Patrick procured from his brother Sir Alexander a diſpoſition whereby he ſold and diſponed to Sir Patrick, his heirs, and aſſignees, his whole lands and eſtate, and diſcharged him of all his intromiſſions therewith; and Sir Patrick by acceptation thereof became bound to pay certain debts therein particularly mentioned, and all other the debts of the ſaid Sir John Home, and Sir Alexander reſerved his own life-rent of part of the eſtate. Of ſame date, Sir Alexander executed a ſeparate diſcharge to Sir Patrick, of his whole intromiſſions in virtue of the ſaid leaſe and otherwiſe, proceeding upon the recital that Sir Patrick had rendered a juſt account thereof to Sir Alexander.

Sir Alexander's lady, and her ſon Robert then a minor, as creditors by the marriage contract, within a very ſhort ſpace after the date of theſe deeds, made an application to the Court of Seſſion to ſet aſide the ſame as procured from Sir Alexander, a man weak and unfit for buſineſs, by fraud and circumvention, and in prejudice of the heir of the marriage whoſe right could not be defeated by Sir Alexander's gratuitous deeds; but in this they did not ſucceed.

Sir Alexander died upon the 27th of May 1698, and after his death his ſon Sir Robert, (party in the preſent appeals) being ſtill a minor, by his curator brought an action againſt Sir Patrick before the Court of Seſſion to waken the former action of count and reckoning, and to reduce and ſet aſide the ſaid diſpoſition and diſcharge of the 31ſt of October 1694, upon the ſaid ground that they had been fraudently obtained from Sir Alexander without any onerous cauſe, and that Sir Alexander by his marriage contract being obliged to reſign his lands in favour of himſelf, and the heirs male of the marriage upon which inhibition had been uſed, he could make no gratuitous diſpoſition and diſcharge to Sir Patrick in prejudice of the heir male of the marriage. The Court on the 12th of January 1699, allowed a probation to either party on the following points: viz. To the ſaid Sir Robert Home, for proving the qualities of fraud and circumvention, and to the ſaid Sir Patrick Home for proving his defences to take off the ſaid qualities, and alſo to the ſaid Sir Robert for proving the rental, caſualties and value of the eſtate

and the time of Sir Patrick's intromiſſions with the rents thereof and the compoſitions obtained by him from creditors; and to Sir Patrick for proving the debts affecting the eſtate diſponed to which he had acquired right, and which were undertaken to be paid by the diſpoſition thereof, together with the publick burdens and other legal deductions from the ſaid eſtate. Witneſſes and other proofs were adduced, and the Court on the 10th of February 1708. "Having adviſed the debate and teſtimonies "adduced and writs produced, and founded on for either party "found the onerous cauſe and valuable conſideration of the "foreſaid diſcharge and diſpoſition granted by the ſaid Sir "Alexander Home deceaſed, to Sir Patrick Home in 1694 "and produced in this proceſs, ſufficiently inſtructed to free "Sir Patrick from fraud and circumvention."

Appealed from by Sir Robert.

Againſt this interlocutor Sir Robert reclaimed, particularly inſiſting upon his father's marriage contract and inhibition thereon; after a hearing the Court on the 16th of July 1708, "found "that the obligation in the ſaid contract of marriage betwixt "the ſaid Sir Alexander Home and Dame Margaret Scott his "Lady, whereby the ſaid Sir Alexander is bound to reſign the "eſtate in favour of himſelf, and the heirs male of the mar "riage, with the inhibition raiſed thereon, did diſable him to "diſpoſe of that eſtate gratuitouſly, in prejudice of Sir Robert "who was heir male of the marriage."

Appealed from by Sir Patrick.

Sir Patrick reclaimed, inſiſting that Sir Alexander Home was by the clauſe in the marriage contract, fiar and might diſpoſe of the eſtate; and further that Sir Robert was ſerved heir male general to his father and ſo obliged to warrant all his father's deeds, and conſequently could not call in queſtion the ſaid diſpoſition and diſcharge. The Court heard parties in their own preſence upon theſe points: viz. "Whether by the retour Sir "Robert be heir of proviſion only, and not liable to warrant "his father's diſpoſition in favour of Sir Patrick, as being con "trary to the proviſion in Sir Robert's father's contract of "marriage; or if heir male alſo, and thereby liable to warrant "his father's diſpoſition." The brief upon which the ſervice proceeded, bore that the perſon to be ſerved was heir of pro viſion, the retour run in theſe words, "hæres maſculus et pro "viſionis quondam Domini Alexandri Home, virtute contractus "matrimonialis confect. inter dictum Dominum Alexandrum et "Dominam Margaretam Scott de dat. 27 Aprilis 1678, per quem "contract. dictus Alexander obligavit ſe, &c. providere totas et "integras terras et baronias de Renton, &c. in favorem dict "Alexandri & hæredum maſculorum tunc procreand. inter illum "et Dominam Margaretam" &c. The cauſe being heard on this matter the Court on the 17th of December 1708, "Having "adviſed the debate with the retour and other documents in "proceſs, found Sir Robert Home was ſerved not only heir to "proviſion, but alſo heir male general." And to this interlocutor the Court adhered on the 5th of January 1709.

Appealed from by Sir Robert.

Appealed from by Sir Robert.

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Sir Robert afterwards inſiſted upon a new ground: viz. "That Sir Patrick having accepted of the leaſe of the ſaid "lands from the ſaid Sir John Home deceaſed he became "thereby a truſtee for the uſe of the ſaid Sir Alexander Home; "and that therefore Sir Alexander could not grant, nor Sir "Patrick accept of the ſaid diſpoſition or diſcharge." After a hearing the Court on the 12th of January 1709, "found "that the reſpondent as heir or otherwiſe repreſenting his "father Sir Alexander, is not obliged to warrant the diſpoſition "of the lands to Sir Patrick Home, or diſcharge of intromiſſions "by virtue of the leaſe or omiſſions; but found that Sir Robert "Home by virtue of Sir Patrick's accepting of the ſaid leaſe, "may quarrel the ſaid diſpoſition and diſcharge, in ſo far as the "ſame was not granted for an equivalent onerous cauſe." And this interlocutor was adhered to on 27th of January thereafter: And the Court on the of 11th February 1709, "found that Sir "Patrick was obliged to count and clear the valuable conſideration "for which the ſaid diſcharge and diſpoſition were granted." On the 17th of July 1711, the Court did for that purpoſe refer the ſaid account to the Lord Ordinary to be audited by him.

Appealed from by Sir Patrick.

Appealed from by Sir Patrick.

Upon Sir Patrick's petition, the cauſe was reheard, and the Court on the 20th of November 1711, "found that Sir Robert "Home was not bound to warrant his father's diſpoſition or "diſcharge, but that he might controvert the ſame, in ſo far as not "granted for valuable conſiderations, and therefore ordered Sir "Patrick to account before the Lord Ordinary in the cauſe."

Appealed from by Sir Patrick.

The original appeal was brought from "ſeveral interlocutors or "decrees of the Lords of Council and Seſſion pronounced the "16th of July 1708, the 12th January 1708-9, the 11th of "February 1708-9, the 17th of July 1711, and 20th of "November 1711, on behalf of Sir Robert Home Baronet."

Entered, 18 January 1711-12.

And the croſs appeal "from ſeveral interlocutors or decrees "pronounced by the Lords of Council and Seſſion the 10th of "February 1708, the 17th of December 1708, and the 5th of "January 1709."

Entered, 8 April 1712.

Heads of Sir Patrick's Argument on the Original Appeal.

It could be no breach of truſt in Sir Patrick with reſpect to Sir Alexander, to accept of an abſolute conveyance of the premiſes from Sir Alexander, becauſe he being entitled to the reverſion after the truſt of the leaſe diſcharged, might diſpoſe of the lands as he thought fit; nor with reſpect to the creditors in whoſe favour the leaſe was made, becauſe all their debts were ſatisfied and paid and they do not complain.

By the interlocutor 12th January 1709, Sir Alexander might have ſold the eſtate to Sir Patrick for an onerous conſideration; and by the interlocutor of the 10th of February 1708, the Court found the onerous conſideration of the purchaſe proved: and ſuch onerous conſideration appears upon the very face of the diſpoſition, for there the debts due by Sir John Home and Sir

Alexander are recited, and all theſe debts together with the rental of the eſtate were under the view of the Court, when they found the onerous conſideration ſufficiently inſtructed.

Sir Alexander to whom Sir Patrick was made accountable by the leaſe having in his lifetime commenced an action againſt Sir Patrick for ſuch account, and having, after the ſame had depended before the Court of Seſſion from 1675 to 1694, given Sir Patrick a full and general releaſe and diſcharge for all the rents received by him, in which it is declared, that Sir Patrick had made juſt account and reckoning for the rents received by him by virtue of the leaſe, Sir Robert ought not now to be admitted as heir to his father to controvert the ſame.

Heads of his Argument on the Croſs Appeal.

(Sir Patrick denies the alleged facts, that Sir Alexander was a weak man, and impoſed upon: he allows that he entertained apprehenſions of witches, but ſtates that many good men had ſimilar notions, and that ſeveral people of late had been executed in Scotland for witchcraft.)

The deed of entail alleged to have been executed by old Sir John is not extant or exhibited in the cauſe, ſo that no argument could be brought from it: and no entail could be made but with the burden of the grantor's debts. If any ſuch entail were made it was cancelled by Sir Alexander, as he acknowledged upon oath before the commencing of any action againſt Sir Patrick, and ſo the terms of it cannot be known.

Soon after the date of the foreſaid diſpoſition and diſcharge, Sir Robert and his guardians applied to the Court of Seſſion, to have the ſame ſet aſide upon the ſame grounds, which he afterwards inſiſted on in the preſent cauſe. But the Court by three ſeveral interlocutors or decrees on the 14th of November 1694, the 4th of December thereafter, and the 13th of November 1695, refuſed to admit the ſaid reaſons, and diſmiſſed the action: and theſe decrees are not appealed from.

The onerous cauſe of this purchaſe appears upon the very face of the deeds; In theſe the rent of the eſtate, amount of debt and reſerved annuities are particularly ſet out; it was evident that a fund could not be raiſed from the rents to pay the annual burdens, and diſcharge the debts. Several creditors alſo had adjudged, and, but for Sir Patrick's interference, would have carried off the eſtate.

With regard to Sir Robert's ſervice, the Court in conſidering this point, called for the whole papers relating to that ſervice, all which expreſsly bear Sir Robert to be ſerved *heir male and of proviſion*. The claim given in to the jury bears expreſsly that he claims himſelf to be ſerved heir male and of proviſion: and the depoſitions of witneſſes adduced, prove that he is heir male and of proviſion; and the verdict of the jury bears the ſame, as does the extract of the retour from the Chancery which is the concluſion of all, What was alledged by Sir Robert in the Court

Court below, that it was only a miſtake of the clerk in adding the particle *et* between the words *maſculus* and *proviſionis* in the retour; and that the brieve which was the warrant of the ſervice bore only *heir of proviſion* and not heir male, is of no moment. For the brieve is only a ſhort piece of form in two or three lines, for a warrant to ſummons the jury, which paſſes of courſe; and it is never regarded how the party is deſigned there, ſeeing the ſame jury ſerves all different ſorts of heirs. When once the jury is met, the party has it ſtill in his option to explain himſelf by his claim or petition, as to the nature and kind of heir he deſigns to be ſerved. And it cannot by law be admitted to allege, that after a writ is recorded, the ſame is falſe by a pretended miſtake of the clerk.

And further Sir Robert oftner than once deſigned himſelf heir male in the Court below; and being heir male he is conſequently bound in warrandice, which is ſo certain a principle in the law of Scotland, that Sir Robert has not appealed againſt the interlocutor of the 2d of December 1708, on that head.

Heads of Sir Robert's Argument on both Appeals.

(Sir Robert in return details the different facts inferring imbecility on the part of his father, and leſion towards his father and himſelf; but theſe facts cannot be ſtated with preciſion from the appeal caſes)

With regard to the retour, the word *et* between *maſculus* and *proviſionis* was inſerted during Sir Robert's minority by a miſtake of the clerk, and ought not to be made uſe of to his prejudice. For 1ſt. The brieve or warrant, which regulates the retour, was only to ſerve him heir of proviſion. 2d. The action was brought by Sir Robert expreſsly as heir of proviſion, and Sir Patrick for many years anſwered on that title; and 3d. There was no inheritance in which Sir Robert could ſucceed to his father as heir male general.

Sir Robert humbly hopes, that after ſuch ſiniſter practices uſed by Sir Patrick to defeat the wife and juſt proviſions of his father, to circumvent a weak brother, to deprive the creditors of their juſt debts, and Sir Robert his nephew of his whole inheritance, and even to reduce him, his wife, and children to beggary, (he having no other eſtate than what depends on the event of this action) and as nothing more is required of Sir Patrick than that he ſhould come to a fair account that the houſe will reverſe the decrees or interlocutors appealed from by Sir Robert, and ſet aſide the ſaid diſpoſition and diſcharge on which they were founded, and affirm the decrees or orders appealed from by Sir Patrick with exemplary coſts.

After hearing counſel, *It is ordered and adjudged that the ſeveral decrees or interlocutors complained of in the appeal of the ſaid Sir Patrick Home be affirmed, and that the ſaid petition and appeal of the ſaid Sir Patrick Home be diſmiſſed; and that the ſeveral decrees or interlocutors pronounced the* 10th *of February* 1708, *the* 17th *of* Judgment, 27 May, 1712.

December 1708, *and the* 5th *of January* 1709, *complained of by the ſaid Sir Robert Home, in his ſaid petition and appeal be reverſed: And it is further ordered and adjudged that the releaſe or diſcharge, and the grant and diſpoſition made by Sir Alexander Home, to the ſaid Sir Patrick Home, complained of by the ſaid petition, and appeal of the ſaid Sir Robert Home having been gained by fraud and circumvention, be ſo far reduced and ſet aſide as to ſtand a ſecurity only for any onerous cauſe, or valuable conſideration paid, or made good by the ſaid Sir Patrick Home for the ſame, and that the ſaid Sir Patrick do account for the rents and profits of the truſt eſtate granted to him by Sir John Home by leaſe the* 13th *May* 1671; *and for all other ſums of money, debts, or moveables contained in the aforeſaid diſcharge and diſpoſition which belonged to the ſaid Sir John Home, and were received by Sir Patrick Home, and which ought to have been applied for the debts charged upon Sir John's eſtate; and be allowed on ſuch account what he really and* bona fide *paid or expended in the juſt execution of the truſt expreſſed in the ſaid leaſe, or as the onerous cauſe or valuable conſideration of the ſaid diſcharge and diſpoſition of the ſaid Sir Alexander to the ſaid Sir Patrick.*

For Sir Patrick, *Edw. Northey. Sam. Mead.*
For Sir Robert, *Thos. Powys. Rob. Raymond.*

The deciſion of the Court of Seſſion on the point of *repreſentation*, though here reverſed, is founded upon in the Dictionary vol. II. hac voce, p. 345. Indeed, as the Court of Seſſion afterwards ordered Sir Patrick to clear the onerous cauſe of the deed on account of the truſt, their judgment on the point of the repreſentation was virtually done away and being therefore but interlocutory ought not perhaps to have been ſtated as an exiſting deciſion.

Alexander Robertſon Eſq. of Strowan, *Appellant*; Caſe 16.
Margaret Robertſon, his Siſter, - - *Reſpondent*.

Fountainhall, 12 Feb. 1712, Forbes, 22 Feb. 1712.

4th *June* 1712.

Proviſion to Children.—A mother being put in poſſeſſion of part of her eldeſt Son's forfeited eſtate for aliment to younger children, in a queſtion with the Son after the eſtate reſtored, it is found that her intromiſſions, above the current intereſt of their portions, went in diſcharge of former intereſt due thereon and of current intereſt, but not in payment of principal, or of intereſt after the intromiſſions ceaſed.

Battery pendente lite.—Circumſtances inferring this crime: though decree taken in the civil action, recourſe might alſo be had to the penal; the pains of battery not remitted by an act of general indemnity.

Coſts.—40l. given againſt the appellant.

BY contract of marriage in Auguſt 1663, between the father and mother of the appellant and reſpondent, the father bound himſelf, his heirs, executors, and ſucceſſors to pay to the younger children of the marriage 10,000 merks ſcots among them for their portions at Whitſunday or Martinmas next after they ſhould attain their ages of 15 years. The iſſue of this marriage were the appellant, the reſpondent, and three younger children.

The reſpondent attained her age of 15 years, on the 18th of May 1681, but before the had received any part of the intereſt or principal, her father died in November 1688, and her brother the appellant ſoon after went beyond ſeas, and became *forefaulted*, and all his paternal eſtate was ſeized by their then majeſties. The younger children being thus left deſtitute, application was made to the Privy Couucil to have ſome part of the eſtate of Strowan allotted to the mother for their maintenance; and on the 5th of February 1691, the Privy Council, by an act allotted the ſaw miln of Strowan, with as much of the wood growing on the eſtate of Strowan as was accuſtomed to be ſawed and wrought, and the whole profits and caſualties thereof, and ſervices thereto belonging, for the maintenance of the younger children during their pleaſure, appointing the ſaid profits, caſualties, and ſervices with the pertinents thereof to be paid and performed to their ſaid mother, for her ſaid children's aliment, during the Council's pleaſure, upon her receipts and diſcharges which ſhould be ſufficient to exonerate the payers ther-of.

The mother and children continued in poſſeſſion till 1704, when the appellant having returned to Scotland, his eſtates were reſtored to him. In 1708, the reſpondent brought an action againſt the appellant before the Court of Seſſion, for payment of her portion being one fourth part of the ſaid 10,000 merks-ſcots, with intereſt ſince 1681, when ſhe attained her age of 15 years.

In this action the appellant pleaded, at firſt that he had no part of his father's eſtate either as heir, or by other paſſive title, but that his intromiſſions were by other ſingular titles, and that

he was not liable to pay the ſaid portions; but after examining ſundry witneſſes on this point, the Court on the 15th of June 1711, found the paſſive titles proved, and the defender to be liable. The appellant then took another defence, that the portions of the younger children were more than fully paid principal and intereſt by their receipt of the profits, &c. of the ſaid ſaw-miln; and the reſpondent contended that ſuch receipt was merely in conſequence of a gift to the mother for maintaining the younger children from government, and was not to be imputed in payment of the principal or intereſt of their portions: after ſundry proceedings in this action and a proof of the intromiſſions allowed, the Court on the 20th of July 1711, "found that during ſuch time as the "purſuer was maintained by virtue of the act of Council out of "the defender's ſaw-miln, there could be no intereſt due to her "for her ſaid portion; but ſuſpended the determining how far "the purſuer's ſuper-intromiſſions ſhould extinguiſh her ſaid "portion, or the intereſt thereof after the defender's entry, till "the proofs of her intromiſſions came to be conſidered."

Sundry witneſſes were examined with regard to the profits of the ſaw-miln, and the purſuer's intromiſſions therewith, and the cauſe being afterwards heard, the Court on the 29th of December 1711, pronounced the following interlocutor, "The Lords having "conſidered the debate with the ſtate of the proceſs and proba-"tion, find that the ſuper-intromiſſion above the intereſt of 10000 "merks, being the younger children's portions during the "mother's poſſeſſion, was not only imputable to the payment of "intereſt during that intromiſſion, but to the payment of the "former intereſt thereof, from the father's deceaſe to the "mother's poſſeſſion by the act of Council, but found that the "ſuper-intromiſſion was not to be imputed in payment of any "part of the principal ſum or intereſt ſince ſhe ceaſed to poſſeſs, "and found that the intromiſſion continued till Whitſunday "1704, and therefore decerned to the purſuer her ſaid portion "with intereſt from that time." Againſt this interlocutor the appellant reclaimed, but on the 9th of January 1711-12, the Court adhered to their former interlocutor.

While this action was in dependance the reſpondent preſented a petition to the Court ſetting forth, that ſince the commencement thereof, in April 1709, the appellant with a deſign to force the reſpondent to relinquiſh her juſt right to her portion, and to give him a diſcharge, did cauſe her to be ſeized on a ſunday by eight men armed with ſwords, piſtols, and guns, and carried as a criminal five miles to the appellant's houſe at Cary, from whence ſhe was by his command dragged away to his miller's houſe, and there kept priſoner with centinels till ſhe made her eſcape; and therefore ſhe prayed that, purſuant to the act of
1594. c. 219. parliament 1594. c. 219., the appellant ſhould be decerned to pay the reſpondent her ſaid debt, damages, and expences. The appellant made anſwers, and the Court allowed a proof of the matters of facts. A proof was taken accordingly in this matter, and reported to the Court, but before procuring judgment thereon,

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the interlocutor of the 29th of December 1711, was pronounced. The reſpondent after this, petitioned the Court to take the proof of the ſaid invaſion into conſideration; to this the appellant made objections, that it was now incompetent as ſhe had taken decree in the civil action, and that the penal action was remitted by the late act of indemnity. Theſe objections were repelled, and the Court on the 22d of February 1711-12, found the complaint "proved in terms of the act of parliament, and therefore de- "cerned the defender to pay to the purſuer the whole debt "libelled with expences."

The appeal was brought from "an interlocutor or decree of the "29th of December 1711, and ſeveral ſubſequent interlocutors." Entered, 4 March 1711-12.

Heads of the Appellant's Argument.

This proviſion to the reſpondent being conſtituted by the mother's contract of marriage, whereby the mother had an intereſt to ſee to the payment thereof, the reſpondent's petition to have her mother put in poſſeſſion of a part of the appellant's eſtate for that end can receive no other reaſonable conſtruction, but that the ſame was done for the full ſatisfaction both of principal and intereſt of theſe proviſions contained in the contract of marriage expreſsly referred to in the application to the Privy Council.

By act of parliament in Scotland, no part of any forfeited eſtate is to be gifted away, and ſo long as there remains any debts upon the ſame, the profits of the eſtate muſt be applied in the firſt place in diſcharging theſe debts; and had not this part of the eſtate been ſo applied for the uſe of the reſpondent, and the other younger children, it would have been applied in payment of other debts, and would have extinguiſhed them.

Beſides it plainly appears, that the Privy Council were deceived in the value of this grant; for the reſpondent applied to the Privy Council, that her mother might be put in poſſeſſion of that part of the eſtate for an aliment to the reſpondent, and the other children in the firſt place, with an order to the factor upon the ſaid eſtate, to pay them the ſurplus, in caſe the ſaid part ſhould not prove ſufficient. The Privy Council then probably intended no more than a ſimple aliment anſwerable to the intereſt of the children's proviſions, and were made to believe that the part of the eſtate they were to poſſeſs would ſcarce amount to ſo much. But now it appears plainly to be of a much greater value.

It is impoſſible to find any manner of reaſon for the diſtinction the Lords of Seſſion have made by their judgment, viz. That the ſuper-intromiſſions ſhould extinguiſh the intereſt of the debts due before their poſſeſſion but not after; for if it was purely to anſwer the intereſt during their poſſeſſion, then it could not ſatisfy any thing due before that time; but if it was applicable towards ſatisfaction of what was before due, then there is all imaginable reaſon that their receipts ſhould extinguiſh their debts, ſo far as they had received.

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As to the ſentence or judgment upon the complaint made again the appellant on the act 1594. c. 219., there is nothing prove againſt the appellant to bring him under that penalty; beſides, was prior to the act of indemnity, and the reſpondent havin taken judgment in the civil action, could not afterwards inſiſt i the penal.

Heads of the Reſpondent's Argument.

The profits of the ſaw-miln were only a gift of the governme to the mother for the aliment of the reſpondent and the oth younger children, who by the appellant's forfeiture were total deprived of maintenance: and the reſpondent never intromitte therewith, otherwiſe than as a ſervant to her ſaid mother, wh diſcharged her of all ſuch intromiſſions.

By the ſaid act 1594. c. 219., It is provided "that if ony pe "ſon either perſewer or defender ſuld happen to ſlay "wound to the effuſion of blood, or utherwiſe to invade ane "them ane uther in ony ſorte quhairupon they micht "criminally accuſed, after the raiſing of the ſummondes an "precepts and lauchful execution thereof, or in ony time befo "the compleit execution to be recovered thereupon, the con "mitter of the ſlaughter, blood or invaſion in maner foreſai "gif he be the defender, he ſall be condemned at the inſtan "of the perſewer, without ony probation of the libel exce "ſummar cognition to be tane of the ſlaughter, bloodſhed, or i "vaſion before the juſtice, or ony other judge competent ther "to."

The acts of invaſion which the reſpondent ſet forth againſt th appellant in her complaint to the Court, were within the pr viſions of this act of parliament; and of this invaſion the reſpo dent made full proof not only by witneſſes, but alſo by letters und the appellant's own hand. She alſo complained to the Court Seſſion of another act of invaſion, which occurred during th examination of the witneſſes.

In July 1711, the Court ordered a ſtate of the proof of th invaſion which had been taken, to be prepared for their conſide ation, and afterwards declared they would conſider the ſame wi their firſt conveniency, but the reſpondent chooſing rather to ſhe the juſtice of her debt, than the barbarity of her brother, d firſt proceed to the obtaining the ſaid decree of the 29th December 1711.

The act of indemnity, upon which the appellant founded pa of his defence relates only to offences againſt the governmer but not to any perſons private right or damages.

Judgment, 4 June, 1712.

After hearing counſel, *It is ordered and adjudged that the app be diſmiſſed; and that the interlocutors or decrees therein complain of be affirmed: and it is further ordered that the ſaid Alexand Robertſon ſhall forthwith pay or cauſe to be paid to the ſaid Margar Robertſon the ſum of* 40l. *ſterling for her coſts ſuſtained in defending ſaid appeal.*

For Appellant, *J. Pratt. P. King.*
For Reſpondent, *Tho. Lutwyche.*

Sir James Sinclair of Dunbeath, Bart. - *Appellant;* Caſe 17.
John Sinclair of Ulbſter, Eſq. - - *Reſpondent.*

2d, *June* 1713.

Proviſions to Children.—A portion being left to a daughter; with a proviſo, that ſhe ſhould not diſpoſe of or incumber the ſame, or intereſt thereof, till the times of payment ſhould be elapſed; ſhe might, nevertheleſs, make an aſſignment thereof, in truſt for herſelf, to have an action carried on to recover the intereſt.

Appeal brought for delay.—In this caſe the reſpondent found entitled to ſuch intereſt, as he might have entitled himſelf to by regiſtering the horning, had he not been reſtrained by the appeal.

Coſts.—40*l.* given againſt the appellant.

WILLIAM SINCLAIR of Dunbeath, Eſq. and John Sinclair his eldeſt ſon, both ſince deceaſed, did by bond of proviſion bearing date the firſt of January 1688, oblige themſelves jointly and ſeverally to pay the ſeveral ſums of money, or portions therein reſpectively mentioned to the ſaid William's younger children, and particularly to Ann his daughter 8000 merks ſcots, or 444*l.* 8*s.* 10½*d.* ſterling, within five years after the ſaid William's deceaſe, and intereſt for the ſame to commence ſix months after his death, and to be paid monthly, quarterly, and continually until payment of the ſaid reſpective portions. And the bond contained a proviſo, that it ſhould not be lawful for the ſaid children to require payment of their ſaid portions, before their reſpective marriages and having a child by ſuch marriage, or to diſpoſe of, or incumber their reſpective portions, or the intereſt thereof, till the times of payment ſhould be elapſed.

The ſaid William Sinclair afterwards did, by a deed on the 19th of Auguſt 1690, bearing to be in conſideration of certain ſums of money, at leaſt for relieving him of the burden of the children's portions to his ſatisfaction by William Sinclair his ſecond ſon, ſell and diſpone to the ſaid William the ſon his whole perſonal eſtate: and he died in September 1690. After the father's death, William the ſon poſſeſſed himſelf of the whole perſonal eſtate, which was of great value, and far more than ſufficient to diſcharge the ſaid portions; and he ſettled the whole of them except his ſaid ſiſter Ann's. William having died, was ſucceeded by the appellant, alſo his brother and heir; and Ann received from her brother William in his lifetime, and her brother the appellant after his deceaſe, for and upon account of the intereſt of her ſaid portions, ſeveral ſums of money in the whole amounting to 72*l.* 9*s.* 1*d.*

The appellant having afterwards refuſed to pay his ſiſter Ann her ſaid portion or the intereſt thereof, and ſhe being unable to carry on an action againſt him on account of her poverty, ſhe aſſigned the bond of proviſion, and all money that was or ſhould become due or payable to her, for principal or intereſt thereupon, *in truſt nevertheleſs for herſelf*, to the reſpondent her relation,

who was willing to proſecute ſuch ſuit in his own name againſt the appellant if neceſſary.

After ſeveral years forbearance, and repeated applications to the appellant, without being able to procure any part of the ſaid Ann's proviſion, the reſpondent, who had advanced ſeveral ſums of money for her ſupport, as well to reimburſe himſelf as for recovering what was further due upon the ſaid bond, for the uſe and benefit of the ſaid Ann, brought an action in his own name againſt the appellant before the Court of Seſſion, for recovery of what was due upon the ſaid bond of proviſion.

The appellant appeared to the ſaid action, and acknowledged, that he repreſented his ſaid brother; but alleged that the ſaid portion was not to be paid until the ſaid Ann ſhould be married and have a child by ſuch marriage which had not happened; and that by the proviſo in the bond, ſhe had no power to transfer or charge the intereſt thereof, before the term of payment were elapſed. And the ſaid Ann's aſſignment being of intereſt to grow due, and not payable when ſuch aſſignment bore date, no action could be brought by the reſpondent, even for the intereſt as the aſſignee of the ſaid Ann. In anſwer to this the reſpondent acknowledged before the ſaid Court, that the ſaid aſſignment was in truſt for the ſaid Ann, and inſiſted that it was therefore the ſame thing as if the action had been in her own name. The Court on the 24th of January 1711-12, "repelled the ſaid "allegation."

And afterwards the Court on the 15th of February 1711-12, unanimouſly "found, that the ſaid aſſignment of the ſaid William Sin- "clair, the father, to the ſaid William his ſon, being upon the nar- "rative for certain ſums of money really and with effect paid and "delivered to him, at leaſt for relieving him of the burden of the "proviſions of his children, done, paid, and performed by the "ſaid William his ſon to his content and ſatisfaction; and that "the ſaid William the ſon having given bonds of proviſion to the "other children, he ought likewiſe to have paid the reſpondent "and the ſaid Ann Sinclair, the ſums granted to her in the ſaid "bond of proviſion."

And in regard the ſaid Ann Sinclair had reſtricted her action to the intereſt of her ſaid portion, after the appellant had petitioned for a rehearing, the Court on the 23d of February 1711-12, adhered to their former interlocutor, as to the intereſt of the aforeſaid portion, and without prejudice to the portion itſelf, and to ſue for the ſame, after the term of payment is elapſed.

Entered, 14 March 1711-12.

The appeal was brought from "two interlocutors of the Lords "of Seſſion, the firſt of the 15th, and the other of the 23d of "February 1711-12."

Heads of the Reſpondent's Argument.

The appellant on purpoſe for delay, and to hinder the reſpondent from proceeding further for the obtaining the effect of the ſaid interlocutors, did on the 14th of March 1711-12, lodge his petition of appeal againſt the ſame, but did not ſerve the reſpondent with the

the order made thereupon, till the 24th of June following, ſo that the reſpondent could not put in his anſwer to the ſaid appeal, in order to have the matter diſcuſſed during that Seſſion, whereby the appellant hath not only delayed the payment of the intereſt of the ſaid portion amounting to about 44*l.* but has prevented the reſpondent from giving him a charge of horning and regiſtering thereof, as he might long ere now have done, and have been thereby, according to the law of Scotland, entitled to intereſt for the ſaid ſum, from the time of ſuch regiſtering.

Counſel appearing for the reſpondent, but no counſel for the appellant, *It is ordered and adjudged, that the ſaid petition and appeal of Sir James Sinclair be diſmiſſed, and that the two interlocutors therein complained of be affirmed; and it is further ordered that the Lords of Seſſion do order Sir James Sinclair the appellant to pay to the reſpondent John Sinclair, all ſuch intereſt as the ſaid John Sinclair might have entitled himſelf unto by diligence had he not been reſtrained from doing diligence by reaſon of the ſaid appeal to this houſe; and it is alſo further ordered that the ſaid Sir James Sinclair ſhall pay or cauſe to be paid to the reſpondent the ſum of* 40*l.* *for his coſts ſuſtained by reaſon of the bringing the ſaid appeal into this Houſe.* Judgment, 2 June 1713.

For Reſpondent, *P. King.*

Adam Cockburn of Ormiſton, one of the Senators of the College of Juſtice, and Dame Ann his Wife, - - *Appellants;*
John Hamilton of Bangour, a Minor, by his Guardian, - - - - *Reſpondent.*

Caſe 18.
Forbes, 4 & 23 July, 1712.

12th *June* 1713.

Conſtruction.—In a queſtion with regard to funeral expences, and expences of confirmation, the Houſe of Peers having reverſed a judgment *in foro* and found that the aſſignee of an executrix *might infiſt* for theſe claims, it was ſtill competent to plead preſcription thereto.

Funeral Charges. Preſcription.—The accounts paid by the ſaid aſſignee, without the 3 years were preſcribed where ſhe herſelf was not contractor, but where ſhe was contractor did not preſcribe.

Confirmation.—The Expences of confirmation though not eſpecially conveyed to the ſaid aſſignee, but paid by her, are found to exhauſt the executry.

Debitor non præſumitur donare.—By marriage contract a wife is provided to the houſhold furniture, the huſband afterwards grants her a bond and the liferent of a houſe is ſettled upon her, theſe may ſubſiſt as ſeparate and diſtinct rights.

AFTER determination given in the former appeal (No. 9. of this collection), the parties returned to the Court of Seſſion, and the appellants claimed the whole funeral expences, and charges of confirmation; and inſiſted that in conſequence of the judgment of the Houſe of Peers, no objection thereto could now be ſtirred on the part of the reſpondent. The latter contended, on the other hand, that objections were ſtill competent; and inſiſted that

that the whole funeral expences were preſcribed, having been paid by the appellant Ann, after a lapſe of three years from the dates of furniſhing; and to the charges of confirmation the respondent made the ſame objection which had formerly been propounded, namely, that they were paid by the executrix herſelf, and were not ſpecified in the aſſignation made by her to the appellant Ann. After ſundry proceedings on theſe points, the Court on the 23d of July 1712, "found that notwithſtanding "of the decree and judgment of the Houſe of Lords, it was "ſtill competent to the defender to propoſe preſcription, and "found the accounts of the funeral charges paid without the "three years are preſcribed where the purſuer Ann was not con "tractor, but where ſhe was contractor do not preſcribe; and "found the expences of confirmation, not being tranſmitted to "the aſſignation to the purſuer Ann, do not exhauſt the ſubject "of the executry."

In the mean time another point had ariſen in this cauſe. By the marriage contract, in the former appeal mentioned, between Sir William Hamilton and the appellant Ann, the latter accepted of the liferent, proviſion thereby provided to her in full ſatisfaction of all legal claims, "except the whole houſhold pleniſhing that "ſhould happen to be in their dwelling-houſes, the time of his "deceaſe, which houſhold pleniſhing, heirſhip moveables in "cluded, in caſe ſhe ſurvived him, he thereby diſponed to her "free of all debts whatſoever." At a ſubſequent period Sir William executed in favour of the appellant Ann, the bond for 7000*l.* in the former appeal mentioned; and having afterwards purchaſed a houſe in Edinburgh, Sir William provided the liferent thereof to her after his deceaſe.

The reſpondent brought an action before the Court of Seſſion againſt the appellants, for reduction of the decree, in the former appeal mentioned, which had been pronounced of conſent of parties and extracted in September 1710, on the ground of minority and leſion, as his curator had omitted to aſk allowance for the value of Sir William Hamilton's houſhold furniture, intromitted with by the appellant Ann; and alſo of the rent of the houſe in Edinburgh, which ſhe poſſeſſed in virtue of the ſaid right of liferent, both which he contended ought to have been deducted from the 7000*l.* bond. After ſundry proceedings in the action of reduction, the Court on the 4th of July 1712, "found "that the 7000*l.* bond granted by the ſaid Sir William Hamilton "to the defender Ann, and the liferent of the houſe alſo pro "vided to her, cannot ſubſiſt as ſeparate and diſtinct rights; and "alſo found that the defender Ann could not claim the houſhold "pleniſhing without allowing the value thereof in part payment "of the 7000*l.* bond, and therefore ſuſtained the reaſons of re "duction as to theſe two articles."

Entered, April 10, 1713.

The appeal was brought from "ſeveral decrees, ſentences, and "interlocutory orders of the Lords of Council and Seſſion, of the "4th and 23d July 1712".

On the point of Funeral Expences, and Charges of Confirmation.
Heads of the Argument of the Appellants.

This point is not now open, for the Houſe of Lords having reverſed the judgment of *lis finita*, and allowed the appellants "*to inſiſt*" for the funeral charges and expences of confirmation, their right to the ſame was thereby eſtabliſhed, and the Court of Seſſion had only to conſider what the appellant Ann had paid on theſe accounts.

With regard to the charges of confirmation, as the executrix aſſigned her whole right of adminiſtration to the appellant Ann, there was no occaſion for any particular aſſignation of theſe charges. And the appellant Ann was taken, bound to indemnify the executrix againſt theſe charges, and has actually paid the ſame.

Heads of the Reſpondent's Argument.

Though it be determined by the judgment of the Houſe of Lords, that the appellant ſhould be at liberty to "*inſiſt*" for the funeral charges, and charges of confirmation, the reſpondent was not, nor was intended to be thereby precluded from inſiſting on any thing he ſhould be adviſed as a bar to this demand.

Though the executrix herſelf might have deducted the expences of confirmation from the perſonal eſtate, yet the appellant Ann has no pretence to do ſo; becauſe as ſhe is not executrix herſelf, and did not pay out any part of theſe expences, ſo ſhe has no manner of right to them from the executrix who paid them; and ſhe neither was nor could be aſſigned to the office of executrix, but only to the perſonal eſtate.

In the Reduction.—Heads of the Argument of the Appellants.

The property in the houſhold furniture accrued to the appellant Ann, in virtue of the contract of marriage, at the very moment of her late huſband's deceaſe, and this property could not be ſuppoſed to be taken from her by the bond for 7000*l.* which did not become payable, or bear intereſt, till about five months after his deceaſe, for he died in December, and the bond did not fall due till the Whitſunday following. They muſt therefore be underſtood as different rights, ſince they were to take effect *at different periods of time.* And the declaration in the bond that it ſhould be effectual for forcing his heirs, &c. to pay the ſame, or elſe that it ſhould affect his whole eſtate real and perſonal, could only be intended of ſuch eſtate as fell to them, of which the houſhold furniture formed no part.

With regard to the liferent of the houſe, though the court had ſuſtained the bond to be in ſatisfaction of the annuity, (which the appellants acquieſced in, knowing that the eſtate was not ſufficient to anſwer both demands) yet it could not be reaſonably ſuppoſed that this bond ſhould be extinguiſhed by the ſubſequent grant of the life-rent of the houſe. Though in the point of the annuity and poſterior bond, the Court held that the annuity was ſatisfied by the bond, upon the ground that *debitor non præſumitur donare,*

donare, yet there is ſtill liberty for a perſon *to give* twice, and th ſecond *gift* cannot be taken away by the firſt, or preſumed to be i ſatisfaction thereof, as a gift might be where the giver lies unde an antecedent obligation.

Heads of the Reſpondent's Argument.

It is a maxim in the law of Scotland, that *debitor non præſumitu donare*, and conſequently whatever the appellant Ann enjoys an poſſeſſes of Sir William Hamilton's eſtate by whatever title muſt b imputed in payment and ſatisfaction of the ſaid 7000*l.* and *pr tanto*. When the action, therefore, was brought for the annuit of 200*l.* ſecured to the appellant by the marriage contract, th Court found that the bond was to be conſidered in ſatisfaction o that annuity. The reſpondent does not at all queſtion the righ of the appellant Ann to the houſhold furniture by the contract o marriage; but he inſiſts, that if ſhe betake herſelf to the bond ſhe cannot touch any part of Sir William Hamilton's eſtate b whatever title, but what muſt be imputed in ſatisfaction of th bond *pro tanto*, for the bond and the proviſions in the contract of marriage, cannot ſubſiſt as ſeparate deeds. And this appear plainly to have been the intention of the grantor, ſince by an ex preſs clauſe in the bond, he declares, that it ſhould *affect hi whole eſtate, real and perſonal*. Nor does the grant by the contract of marriage tranſmit the property in the furniture immediately; but it muſt have been confirmed, given up in the inventory, an was ſubjected to the payment of the huſband's debts, which neve was diſputed.

Nor is it of moment to urge that the life-rent of the houſe being granted after the bond, the ſame could not be in ſatisfactio of that life-rent. For by the law of Scotland a bond by a huſband to his wife is looked upon only as a legacy or teſtamentary deed, and is interpreted to be only dated from the death of the grantor; and conſequently this bond muſt be looked upon as poſterio in date to the deed giving the appellant Ann the life-rent o the houſe.

Judgment, 12 June 1713.

After hearing counſel, *It is ordered and adjudged, as to ſuch par of the ſaid decree or interlocutory ſentence of the* 23d *of July, complaine of in the ſaid appeal, whereby the ſaid Lords of Council and Seſſion found "that notwithſtanding the decree and judgment of this houſe, it wa "ſtill competent to the reſpondent to propoſe preſcription," and found "that the accounts of the funeral charges paid without the three year "were preſcribed, where the appellant Ann was not contractor, bu "where ſhe was contractor, were not preſcribed," that the ſame be ſ far affirmed: but as to ſuch part of the ſaid decree or interlocutory ſen tence of the ſaid* 23d *of July, complained of in the ſaid appeal, whereb the ſaid Lords of Seſſion found the expences of confirmation (or adminiſtration), not being tranſmitted by the aſſignment to the appellant Ann did not exhauſt the executry or perſonal eſtate, it is further ordered an adjudged, that the ſame be ſo far reverſed; and it is further ordered an adjudged that the ordinary and extraordinary coſts and expences touching the adminiſtration or confirmation of the teſtament of the deceaſed*

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ſhall be taken as remaining due upon the bond bearing date the 5th *day of March* 1703, *and be computed with intereſt from ſuch time as the ſame ſecured by the ſaid bond became payable until the payment thereof, and ſtand as a charge upon the heritable eſtate: And it is further ordered and adjudged, that the ſaid decree, order, or interlocutory ſentence of the* 4th *July laſt, whereby the Lords of Council and Seſſion did find,* "*that* "*the ſaid bond of* 7000l. *granted to the appellant Ann by her late* "*huſband, and the eſtate for life, in the houſe granted alſo to her by* "*her ſaid late huſband, could not ſubſiſt as diſtinct ſeparate rights, and* "*that ſhe could not claim the houſhold goods, by virtue of her contract* "*of marriage, without deducting the value thereof from the ſaid bond,* "*and therefore ſuſtained the reaſon of the reduction of the decree men-*"*tioned in the ſaid appeal,*" *as to thoſe two articles be reverſed.*

For Appellants, *T. Powys. P. King.*
For Reſpondent, *Rob. Raymond. J. Pratt.*

The judgment of the Court of Seſſion on the point of the maxim *debitor non præſumitur donare*, though here reverſed, is ſtated as an exiſting caſe in the Dictionary of Deciſions, vol. II. voce *preſumption*, p. 145. and in Erſkine, B. 3. Tit. 3. §93.

William Lord Viſcount Kilſyth, Sir Hugh Paterſon of Bannockburn, John Murray of Touchadam, Archibald Seton of Touch, and John Erſkine of Balgounie, Heritors of the Pariſh of St. Ninians in the Shire of Stirling, for themſelves and in name and behalf of the other Heritors of the ſaid Pariſh, - - - - - *Appellants;*
The Moderator and Preſbytery of Stirling, *Reſpondents.*

Caſe 19.

13th *June* 1713.

Teind Court.—Reaſons ſufficient to reduce a decreet of erection of a new pariſh.—The reaſons of reduction ought to have been adviſed before ordering a new proof and perambulation.

IN 1696, an application was made to the Preſbytery of Stirling by certain heritors of the pariſh of St. Ninians, ſetting forth that the ſaid pariſh being near ten miles in length from weſt to eaſt, and ſix in breadth from north to ſouth, and very populous, it was impoſſible for one perſon to ſerve the cure; and ſeveral of the pariſhioners being at conſiderable diſtance from, and having bad roads to the church, could very ſeldom attend divine ſervice; and there being free teinds therein ſufficient for the maintenance of two miniſters, the application therefore ſtated, that it was neceſſary that the ſaid pariſh ſhould be divided, and a new church

erected in the eaſt part thereof. The Preſbytery, having made perambulation in conſequence of this application, agreed that the ſhould be a new pariſh church erected and built at Sauchinford, a that certain lands by them mentioned ſhould be disjoined from t pariſh of St. Ninians, and annexed to the new pariſh of Sauchinfor

Accordingly, in 1697, the moderator of the ſaid preſbyte brought an action before the then commiſſioners for plantation churches and valuation of teinds, againſt the heritors or propri tors of the ſaid pariſh of St. Ninians, for disjunction of certa lands from that pariſh, and erecting them into a new pariſh; a to have a new church erected at Sauchinford, and a ſtipend ſe tled and allocated to ſuch miniſter as ſhould be ordained to t new pariſh. Appearance was made by the appellants and oth heritors of the pariſh in this action, as defenders therein, and t lords commiſſioners appointed two of their own number, or a one of them, to perambulate the bounds, and to report what w proper to be done.

The commiſſioners ſo appointed, accordingly met at Sauchi ford, and after ſome ſteps taken by them, gave it as their op nion, that a new erection was proper and neceſſary in the eaſt e of the ſaid pariſh of St. Ninians, and that Sauchinford was t moſt convenient place for building the new church; and in the terms they made their report to the ſaid commiſſioners for pla tation of churches, &c. Theſe commiſſioners, by their interl cutor, on the 26th of January 1697-8, "Separated and disjoin "the lands" therein particularly mentioned "from the chur "and pariſh of St. Ninians, and united and erected them into "new pariſh by themſelves, and decerned and ordained a ne "church to be built for the eaſe of all the inhabitants of the ſa "lands at Sauchinford, to be thereafter called the pariſh chur "of Sauchinford, and ordained letters of horning to be direct "to the heritors and pariſhioners to meet and ſtent themſelves f "buying ground for the church and church-yard, and for buil "ing the ſaid church and church-yard walls and manſe." T defenders in the ſaid action preſented a petition reclaiming again ſaid interlocutor, inſiſting that a new erection was unneceſſar and even if it were neceſſary, that Sauchinford was not a prop place for the new erection: but the lords commiſſioners, on t 2d of February thereafter, adhered to their former interlocuto And in theſe terms decree was extracted.

Nothing, however, was done in conſequence of this decr till June 1709, when the reſpondents brought an action befo the lords of council and ſeſſion as commiſſioners for plantation churches and valuation of teinds, againſt the heritors of the p riſh to modify, allocate, and appoint a ſtipend for a miniſter the ſaid new kirk and pariſh, called the pariſh of Sauchinford.

And the appellants, on the other hand, brought their actio to reduce and ſet aſide the ſaid decree, on the grounds, that t methods preſcribed by the lords commiſſioners themſelves in pe ambulating and ſurveying the ſaid pariſh, and adjuſting a pla for building the ſaid church, were by no means obſerved; th

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the church was to have been built in the moſt inconvenient part of the pariſh; and likewiſe, that ſeveral of the heritors were not called in the ſaid action, particularly the Duke of Montroſe, then a minor, his tutors or guardians, nor the truſtees of Cowan's Hoſpital, who were conſiderable proprietors in the pariſh.

The lords commiſſioners pronounced an interlocutor on the 11th of February 1712-13 in the following terms: "Before anſwer to the reaſons of reduction, ordain the haill pariſhes of St. Ninians and Sauchinford to be perambulated, and for that effect grant commiſſion to the ſheriff of Linlithgow or his depute to take and receive the oaths and depoſitions of ſuch famous witneſſes as ſhall be adduced for clearing the diſtances of places, or any other points which may happen to be controverted with relation to the new erected pariſh, or the conveniency or inconveniency of the new erected kirk; and in the mean time appoint the whole heritors of both pariſhes to depone upon their rentals before the ſaid commiſſioners."

The appellants reclaimed, praying the lords commiſſioners to determine with regard to the reaſons of reduction in the firſt place, before putting the heritors to the trouble or expence, which would be the conſequence of the former interlocutor: but on the 18th of February 1712-13, the lords commiſſioners "adhered to their former interlocutor."

The appeal was brought from "a decree made by the lords commiſſioners for plantation of kirks and valuation of teinds in the year 1697-8; and of two interlocutors of the 11th and 18th of February 1712-13, made by the lords of council and ſeſſion." Entered 21 April, 1713.

Heads of the Appellants' Argument.

If a new erection were neceſſary, it ought to have been done with the conſent of the heritors of the pariſh; but though the appellants and all the heritors, except Sir John Schaw of Greenoch, and Mr. Greenyards his factor, (who made the original application to the preſbytery,) pleaded againſt this new erection, yet the lords commiſſioners paid no regard to ſuch oppoſition, but over-ruled the plea of the appellants. This arbitrary mode of proceeding in ſimilar caſes occaſioned the parliament of Scotland, when they veſted the powers, formerly lodged with the commiſſioners for plantation of churches, in the lords of ſeſſion, to make an expreſs injunction, that they ſhould not disjoin any pariſhes, erect or build new churches, or annex or diſmember churches, but with conſent of the heritors having three parts in four at leaſt of the valuation of the pariſh to be disjoined. And though this act of parliament be poſterior to the decree of 1697-8, yet the reaſon and juſt foundation of the law ought to have ſome weight to avoid this decree.

The methods preſcribed by the lords commiſſioners themſelves for perambulating the pariſh were not obſerved by thoſe entruſted by them. For they only went into one corner of the pariſh, and refuſed to perambulate the whole pariſh, when deſired by ſome of

the heritors; and, without taking the depoſitions of witneſſes, either touching the neceſſity of a new erection, or the place where the new church ſhould be erected, they put ſome queſtions to the perſons accidentally preſent, and went to a certain place where they could not ſee the tenth part of the pariſh, and had only in view that very part and thoſe very lands contained in the preſbytery's report. Upon this very ſlight view, they reported that a new erection was neceſſary, and that Sauchinford was the moſt convenient place for building the church. This favoured ſo much of partiality, firſt to appoint a perambulation upon the deſire of only two heritors, and then to perambulate only that part which thoſe two deſired, being near to their own houſes, that the decree ought certainly to have been reduced for that reaſon. And if any new erection were neceſſary, Sauchinford is the moſt improper place in the whole pariſh; for it is within two miles of the old pariſh church, and none of the lands annexed to the new erected pariſh are above three miles diſtant from ſuch old church, and have a very good road to it, and ſeveral neighbouring churches; whereas ſeveral parts of the ſouth-weſt end of the pariſh are ſeven or eight miles diſtant from the old church, and have very bad roads to it, and the new intended church will be two miles farther diſtant from theſe places.

It is an unqueſtionable rule and maxim of the law of Scotland, that any action of this kind, if not brought againſt all the heritors or proprietors, is in itſelf void, even againſt thoſe againſt whom it is brought. In the preſent caſe, neither the Duke of Montroſe's tutors, nor the truſtees of Cowan's Hoſpital, who are conſiderable proprietors, were called, and conſequently the decree muſt be reduced. This is ſo certain a rule that it has never been diſputed or controverted, and the Lords of Seſſion were ſo ſenſible of this, that they declined to give judgment upon it, but in a manner delayed it by their interlocutor of the 11th of February laſt.

If the decree of 1697-8 were ſo illegal and informal, it is apprehended the Lords of Seſſion were in the wrong to decline giving judgment upon them, and to ordain a new perambulation; for all that trouble and expence was to no purpoſe, till it were determined whether the decree was good or not, and conſequently a new erection neceſſary.

Heads of the Reſpondent's Argument.

The original application in this matter to the preſbytery in 1696, was by many of the heritors of the pariſh, with concurrence of the miniſter. The decree which was obtained being in the hands of Sir John Schaw (the chief heritor who obtained it), and he happening to die leaving his ſon a minor, the reſpondents could not for ſeveral years procure the ſame to be exhibited.

When a commiſſion of perambulation is granted, eſpecially by judges to any of their own number, concerning the ſituation or bounding of any place, the ſame is beſt executed by ocular inſpection, which the commiſſioners here made from eminences to which

which they were conducted by the appellants themſelves, and from whence they viewed the circumjacent places within the ſaid pariſh, as appears by their report. As to their not perambulating the whole pariſh, there was no reaſon for ſuch perambulation, ſince the libel, whereon the commiſſion was founded, related only to the eaſt end of the pariſh of St. Ninians, for a diviſion whereof the ſuit was expreſsly brought.

With regard to the objection, that all the heritors were not ſummoned in the original action, it ſufficiently appeared by the decreet therein, that as well the Duke of Montroſe and his mother and her huſband, as the then maſters (the ſole managers) of Cowan's Hoſpital were all duly ſummoned.

It was to obviate every colour of objection for want of a ſufficient perambulation, that the Lords of Seſſion, before determining the reaſons of reduction, granted commiſſion for a new perambulation, and to take the depoſitions of the heritors upon their rentals, extant in proceſs. And when the appellants petitioned againſt ſuch new perambulation, &c. and prayed that the reaſons of reduction might be firſt determined, as their petition was only deſigned for delay, their lordſhips refuſed the ſame.

After hearing counſel, *it is ordered and adjudged, that the decree and interlocutors in the ſaid appeal complained of, be reverſed.* Judgment, 13 June 1713.

For Appellants, *Rob. Raymond. Tho. Lutwyche.*
For Reſpondent, *P. King. John Pratt.*

George Innes, Provoſt, Kenneth Mackenzie, Alexander Falconer, and James Charles, Baillies of the Burgh of Elgin, and James Ruſſell, Beadle or Sexton, - - *Appellants*;

The Miniſters of the Church of Elgin, her Majeſty's Advocate, and John Dundas, Procurator for the Church of Scotland, - *Reſpondents.*

Caſe 20. Kaimes's Law Tracts, p. 276. Maclaurin's Crim. Caſes, p. 582.

3d *July* 1713.

An Appeal from Interlocutors of the Court of Seſſion, and Decrees of the Court of Juſticiary founded thereon.

Intruſion into Churches.—The Magiſtrates of Elgin, being pannelled and convicted under the acts 1695, c. 22., and 1711, c. 7. of an intruſion into the Pariſh Church, and a fine impoſed upon them, the Judgment is reverſed.

PART of the ancient cathedral church of Elgin was fitted up for divine ſervice in the modern form, and uſed as the pariſh church of Elgin. Adjoining to this pariſh church, but ſeparated from it by a wall with a mutual door of communication was a chapel called the *Little or Eaſt Kirk*, which was alſo fitted up with pews and deſks for publick worſhip; and of this *Little Kirk*, the appellants, who are of the epiſcopal communion, contended that

they had the diſpoſal for religious uſes excluſive of the miniſters of Elgin.

In 1704 Mr. Henderſon, an epiſcopal miniſter, with conſent and permiſſion of the then magiſtrates of Elgin, made uſe of the Little Kirk for divine worſhip; but the miniſters of the burgh made their complaint to the Privy Council, and their Lordſhips made an order commanding and ordaining the ſheriff of the county of Elgin to put and keep the ſaid miniſters in peaceable poſſeſſion of the ſaid *Little Kirk*, and to hinder and debar all other perſons from making uſe of the ſaid *Little Kirk* in time coming as they ſhould be anſwerable at their higheſt peril. Mr. Henderſon was accordingly by virtue of this order removed, and the miniſters put and kept in poſſeſſion.

In 1712, however, the appellants took a further ſtep in exerciſe of the conteſted right. Having granted leave to Mr. Blair, an epiſcopal clergyman, to perform divine ſervice in the Little Kirk for the benefit of the inhabitants of Elgin who were of that communion, the appellant Ruſſell, to whom the keys had been entruſted by the miniſters of Elgin, delivered them on the 29th of May that year to the magiſtrates, or opened the doors for them who with Mr. Blair accordingly took poſſeſſion of the Little Kirk.

The reſpondent the procurator for the church, with the concurrence of her Majeſty's advocate, brought a criminal actio againſt the appellants, and alſo againſt Mr. Blair, before the Lord of Juſticiary, for an intruſion into the ſaid *Little Kirk*, as being contrary to the act of parliament 1695, c. 22. and the Toleratio Act 1711, c. 7. and demanded the reſtitution thereof to the miniſters of Elgin, and that the appellants might be aſſeſſed in damages: but as to Mr. Blair the proſecution was ſoon after dropt.

1695, c. 22.
1711, c. 7.

The appellants made defences, the magiſtrates inſiſting upon their right to diſpoſe of the ſaid chapel; and the Lords of Juſticiary in conſideration of what was alleged on either ſide, before they would give their final judgment, remitted this point to be determined by the Court of Seſſion, viz. "Whether or not the "place called the Little Kirk then poſſeſſed by the epiſcopal "miniſter, be a pariſh church or part of the pariſh church of "Elgin."

Parties accordingly were heard before the Court of Seſſion, and on the 24th of July 1712, the Court "allowed a conjunct pro"bation to both parties for proving if or not the ſaid *Little Kirk* "be habite or reputed to have been antiently the choir of the "ſaid church called St. Giles's, or part of the ſaid Great Church "or how far the ſaid Little Kirk, either in the time of preſbytery "or epiſcopacy, has been poſſeſſed by the miniſters of Elgin, by "preaching, baptizing, catechiſing, or marrying therein; and "how far poſſeſſed by the magiſtrates and town council *for other* "*uſes*, excluſive of the ſaid miniſters."

Witneſſes were examined, and the Court of Seſſion on the 16th of December 1712 "Found it proved, that the place now called "the

" the Little Kirk has been habite and reputed to have antiently " been the choir of the church of Elgin called St. Giles's church, " which is the pariſh church, and that the ſaid *Little Kirk* is a " part of the ſaid St. Giles's church; and that both in the times " of epiſcopacy and preſbytery, the ſaid *Little Kirk* has been " made uſe of for divine ſervice, for preaching, baptiſing, and " catechiſing therein: and find it not proved, that the magiſtrates " of Elgin have employed the ſaid Little Kirk for any other uſes " excluſive of the biſhop and miniſters their uſing and poſſeſſing " thereof: and therefore find, the ſaid place called the Little " Kirk of Elgin is part of the ſaid St. Giles's church, the pariſh " church of Elgin."

The proceedings of the Court of Seſſion being reported to the Lords of Juſticiary, the appellants preſented a petition to their Lordſhips, ſtating that the interlocutor of the Court of Seſſion of the 16th December was void, not being ſigned the day it was pronounced, and ſeveral alterations being made upon it the day after: but the Lords of Juſticiary pronounced an interlocutor on the 9th of February 1712-13, which, after reciting the ſaid interlocutor of the Court of Seſſion, " Found that the preſent eſtabliſhed " miniſters their entruſting James Ruſſell with the keys of the " Little Kirk, and his refuſing to deliver the ſame to the ſaid " miniſters, but delivering the ſame to Mr. Blair, or opening the " ſaid *Little Kirk* for his uſe, relevant to infer an arbitrary pu- " niſhment, damages, and expences againſt the ſaid James Ruſſell; " and alſo found that the magiſtrates their turning the ſaid eſta- " bliſhed miniſters out of the poſſeſſion of the ſaid kirk, and put- " ting the ſaid Mr. Blair in poſſeſſion of the ſame relevant to " oblige the magiſtrates to repone the ſaid eſtabliſhed miniſters " to the peaceable poſſeſſion of the ſaid Little Kirk, and to infer " an arbitrary puniſhment, damages, and expences againſt the " ſaid magiſtrates; repelled the defence proponed for the magi- " ſtrates and James Ruſſell; and remitted them and the libel as " found relevant to the knowledge of an aſſize."

After a proof taken before the jury, they by their verdict " found that James Ruſſell had the truſt of the keys of the ſaid " Little Kirk, and that the magiſtrates with Mr. Blair took poſ- " ſeſſion of the ſaid Little Kirk upon the 29th of May 1712." After this verdict was returned, the Court of Juſticiary on the 2d of March 1712-13 " decerned and ordained the ſaid magiſtrates " and their ſucceſſors in office, and the ſaid James Ruſſell jointly " and ſeverally to deliver all the keys of the ſaid Little Kirk to " the eſtabliſhed miniſters and Kirk Seſſion of the ſaid burgh and " pariſh, and to put the eſtabliſhed miniſters and Kirk Seſſion in " peaceable poſſeſſion of the ſaid *Little Kirk*, and to pay 30*l.* " ſterling as expences, and a fine of 20*l.* ſterling; and ordained " Kenneth Mackenzie" (the cautioner for the other appellants) " to make preſent payment of the ſaid ſums, or be impriſoned till " payment thereof."

The appeal was broug't from " ſeveral interlocutory orders, " or ſentences of the Lords of Seſſion of the 24th of July and 16th " of

Entered, 17 April 1713.

" of December 1712, and the orders, ſentences, or decrees of the " Lords of Juſticiary of the 9th of February and 2d of March " 1712-13 founded thereon."

Argument of the Appellants (a).

The pariſh church of Elgin, being large enough for the preſbyterian congregation, the leave granted by the appellants to Mr. Blair to perform divine ſervice in the Little Kirk, could be no diſturbance to them.

The magiſtrates having merely inſiſted on their right of diſpoſing of the ſaid Little Kirk for holy uſes (*b*), the words in the interlocutor of the Court of Seſſion, of the 24th July 1712, allowing it to be proved " how far poſſeſſed by the magiſtrates and " town-council *for other uſes*," were inſerted without reaſon.

When the witneſſes were examined on both ſides, the appellants did fully prove, that the Little Kirk, when ruinous, was repaired at the ſole charge of the magiſtrates and community, as a church belonging to themſelves, diſtinct from the pariſh church; that the ſeats therein were erected by the burgeſſes, and that no country pariſhioners had ſeats therein, but ſuch only as were burgeſſes or tenants of the ſaid town; that the Biſhop of Moray and his Vicar always adminiſtered the ſacraments, and preached in St. Giles's church, and never in the Little Kirk but only in 1684, by the magiſtrates' allowance, when St. Giles's church was ruinous; on which occaſion the Biſhop made application to the magiſtrates and town-council for the uſe of the Little Kirk, and as ſoon as the pariſh church was repaired, he returned the keys of the Little Kirk to the magiſtrates, thanking them for the uſe thereof, and uſing theſe words " we found it cloſe, and we return it " cloſe:" that the Little Kirk hath not within memory of man been reputed the pariſh church or any part thereof, and is of a different ſort of building, and that the magiſtates had frequently diſpoſed of the ſame for religious uſes: that there is no communication between the Great Church and the Little Kirk, ſave only by a very ſmall door, which has been made in the wall, which divides the ſame, of late years, for the convenience of ringing the bell: that upon the revolution, when the government was in ome diſorder, the pariſh miniſters uſurped the poſſeſſion of this chapel, but as ſoon as the publick affairs were ſettled, the magiſtrates demanded the keys thereof from them, as a place to which the miniſters had no right, and they being ſenſible thereof delivered up the ſame accordingly, and they were afterwards kept by ſuch perſons as were appointed by the magiſtrates.

But afterwards on the removal of an epiſcopal miniſter, as not legally qualified, the preſbyterian miniſters in ſome meaſure poſſeſſed the ſaid chapel by permiſſion of the magiſtrates, and made uſe thereof for baptiſing, catechiſing, and weekly lectures, which the reſpondents having proved, and having alſo made ſome ſlender

(*a*) In this caſe, on account of its ſingularity, it was deemed proper not to abridge the argument. The Judgment is alſo ſtated at length.

(*b*) This fact is denied by the reſpondents.

proof

proof that the ſaid Little Kirk had been reputed by ſome to have been the choir belonging to the great church, the Court of Seſſion on that evidence, and by taking advantage of the words "to "other uſes" inſerted in their interlocutor before mentioned, proceeded to pronounce their other interlocutor of the 16th of December 1712, though the appellants had made ſufficient proof of the magiſtrates diſpoſing of the ſaid Little Kirk to the ſame religious uſes, excluſive of the pariſh miniſters.

Though this laſt mentioned interlocutor was pronounced on the 16th day of December, yet it was not written fair or ſigned by the Lord Preſident on the day it was pronounced as it ought to have been; but the Court of Seſſion did the next day make ſeveral alterations thereon, without calling parties before them, contrary to the act 1693. c. 18. whereby the ſaid interlocutor became null and void. And when this interlocutor was tranſmitted to the lords of juſticiary, the appellants gave in a petition to their lordſhips repreſenting that it was for theſe reaſons become null and void; and that they preſumed the truth of the fact conſiſted with their lordſhips own knowledge, as being judges in both Courts, and offering to make proof thereof if they ſhould be admitted to do ſo. The lords of juſticiary however, without taking any notice of this matter, or allowing the appellants to produce witneſſes (as they could have done) to prove the ſame, or giving any anſwer thereto, pronounced their interlocutor of the 9th of February laſt on the relevancy, wherein the ſaid void interlocutor of the Lords of Seſſion of the 16th of December laſt is recited as the ground thereof.

Argument of the Reſpondents.

The cathedral or pariſh church of Elgin, was at firſt built in the form of a croſs, the weſt part of which formed the body of the church, the eaſt the choir, and upon the ſouth and north are two little aiſles, and over all a large ſteeple raiſed upon four arches in the center.

The witneſſes examined in this cauſe fully proved, that the Little Kirk was anciently the choir of the great church; that theſe two are joined together by a ſteeple which ſtands upon four arches, whereof one looks into the great church, and the other into the Little Kirk; that the laſt is built up, but the difference of the building wherewith it is filled up, is eaſily diſtinguiſhable, and there is ſtill a door left in the ſaid wall, by which people ſitting near to it may in the Little Kirk hear a ſermon preached in the Great Church: That ſeveral of the proprietors of the pariſh have ſeats in the Little Kirk, and it was lately repaired by the Kirk Seſſion: That for ſeveral years it was the only pariſh church, the other being out of repair, and that the preſent pariſh miniſters have been in uſe to preach, baptiſe, catechiſe, marry, and keep ſeſſions in the ſaid Little Kirk, and always preached their weekly ſermons on Tueſdays there: and that, as well before as after the revolution, the pariſh miniſters of Elgin made uſe of the ſaid Little Kirk for divine ſervice. All theſe facts are not only proved

by

by the witneſſes for the reſpondents, but alſo by ſeveral of thoſe adduced for the appellants.

The appellants in their defences before the Lords of Juſticiary pretended to a property in the Little Kirk, and a right of diſpoſing of it as they pleaſed; not to holy uſes only, but as a place belonging to the burgh, and employed by the magiſtrates as a ſchool-houſe, as a publick office for collecting taxes, an ordinary Court for juſtices of peace, and a magazine for the ſaid town.

The interlocutor of the 16th of December was duly ſigned, according to the cuſtom of the Court of Seſſion, notwithſtanding what the petition of appeal untruly ſuggeſts.

Though the ſeveral interlocutors of the Court of Seſſion, and Lords of Juſticiary be warranted by all the rules of equity and juſtice, the appellants have appealed from them, under pretence that the ſaid Little Kirk was no part of the pariſh church, but belonged to the magiſtrates of the burgh, and was at their diſpoſal. But not only the ſituation of the Little Kirk pleads the contrary, but the jury have alſo found the contrary; and it appears plainly from the proof, that both before and ſince the revolution, the miniſters of Elgin have been in a conſtant uſe of performing divine ſervice as well in the Little Kirk as the other. And when Mr. Henderſon in 1704 did intrude into this Little Kirk, the Lords of the Privy Council aſcertained the miniſters right to the ſame, and ordered them to be put and continued in the quiet poſſeſſion thereof; and ſince the act paſſed laſt Seſſion of Parliament expreſsly excepts pariſh churches from being uſed by any of the epiſcopal perſuaſion, they ſhould have ſatisfied themſelves with the indulgence ſo granted to them, and not have endeavoured to diſturb the peace, and quiet of the church of Scotland, by diſpoſſeſſing the ſaid miniſters of the Little Kirk, which they were poſſeſſed of.

1711. c. 7.

Judgment, 3 July, 1713.

After hearing counſel upon the petition and appeal of George Innes Provoſt, and Kenneth Mackenzie, Alexander Falconer, and James Charles Baillies of the burgh of Elgin, in North Britain, and James Ruſſell, beadle or ſexton, from ſeveral interlocutory orders, or ſentences of the Lords of Seſſion of the 24th *of July and* 16th *of December laſt, and the orders, ſentences, or decrees of the Lords of Juſticiary of the* 9th *of February and* 2d *of March laſt, founded thereon, made on the behalf of the plaintiffs and proſecutors in this cauſe, praying the reverſal of the ſaid orders, ſentences or decrees; as alſo upon the anſwer of John Dundas, Eſq. procurator for the church of Scotland, and Sir James Stewart, Bart. one of her Majeſty's Solicitors for Scotland, for her Majeſty's intereſt, and due conſideration of what was offered thereupon:*

It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament aſſembled, that the ſeveral interlocutory orders, or ſentences of the 24th *of July and* 16th *of December laſt, and other ſubſequent orders complained of in the ſaid appeal, ſhall be and they are hereby reverſed; and it is further ordered and adjudged that the ſaid appellants be quieted in the poſſeſſion of the Little Church in Elgin, it being no part of the Pariſh Church; and that the ſaid reſpondents do repay to the ſaid appellants*

appellants the coſts and fine adjudged by the ſaid Lords of Juſticiary to the ſaid reſpondents.

For Appellants, *Rob. Raymond, Tho. Lutwyche.*
For Reſpondents, *John Pratt, P. King.*

This being the only inſtance of an appeal from the Court of Juſticiary that has been decided upon in the Houſe of Peers, it has at different periods met with much conſideration. A ſhort ſtatement of the facts is given by Lord Kaimes in his law tracts, p. 276; and by Mr. Maclaurin in his collection of criminal caſes, p. 582; but this laſt learned author mentions that he had not been able to get inſpection of the appeal caſes, though a ſearch had been made for them.

It does not appear that any objection was ſtated to the *competency* of this appeal, at leaſt no traces of ſuch objection are to be found in the caſes, or in the journals of the Houſe of Lords. It is worthy of notice, on this point of the competency, that in the appeal of Greenſhields v. Lord Provoſt and Magiſtrates of Edinburgh, (No. 5. of this collection,) the ſubject of which was very ſimilar to that of the preſent appeal, an objection as to competency, though of a different nature from what might have been ſuggeſted on the preſent caſe, was then argued and over-ruled.

The objection of the appellants relative to the alleged nullity of the interlocutor of the Court of Seſſion, is not mentioned by Lord Kaimes or Mr. Maclaurin, and what weight it might have in the *ratio decidendi* no where appears.

It may be proper here to mention that in the Journals of the Houſe of Lords, 26th November 1724, there appears an appeal from the Court of Juſticiary; Munro and others v. Bayne, his Majeſty's advocate, and others. This appeal ſeems to have been received without objection, but no further proceedings are to be found on the Journal relative thereto.

Caſe 21. James Don Eſq; - - - - *Appellant*;
Forbes, 28 Nov. 1712. 5 Feb. 1713. Sir Alexander Don of Newton, - - *Reſpondent.*

14th *July* 1713.

Conſtruction.—An eſtate is entailed by a perſon to himſelf in liferent, and to l eldeſt ſon and the heirs male of his body, whom failing to the entailer hi ſelf, whom failing to his ſecond and third ſons, and the heirs male of th bodies, &c. whom all failing to the father's neareſt heirs, and aſſignees: a other eſtate is entailed to the ſecond ſon of the former entailer and the he male and female of his body, whom failing to the ſaid former entailer and l heirs male of tailzie, and proviſion in the former entail: after failure of t inſtitute in the ſecond entail and the heirs male and female of his body, t heir male of the firſt entailer ſucceeds to the eſtate contained in the ſeco entail.

Tailzie.—An heir of entail prohibited from alienating gratuitouſly, where t prohibitory, irritant, and reſolutive clauſes, were referred to as contained another entail.

At making an entail the inſtitute reconveys to his father an eſtate formei ſettled upon him, and he and his wife diſcharge an obligation upon the fat by their contract of marriage; the inſtitute, nevertheleſs, cannot grat touſly alter.

SIR Alexander Don of Newton, the grandfather of the appe lant and reſpondent, had iſſue three ſons, James, Alexande and Patrick. In conſideration of a marriage between Alexande his ſecond ſon, and Anna, the daughter of George Pringle Eſ who brought her huſband a conſiderable portion, Sir Alexand did, by their contract of marriage in 1677, ſettle and diſpone h lands of Broomlands and Ravelaw to the ſaid Alexander his ſ cond ſon, his heirs and aſſignees, in fee or property, without ar reſtriction; and Sir Alexander did thereby alſo oblige himſelf lay out 25,000*l.* Scots in the purchaſe of other lands to be ſettl in the ſame manner, and to pay the annual intereſt thereof unt ſuch purchaſe could be made to the ſaid Alexander the ſon: ar the lands of Broomlands and a houſe in Kelſo were thereby ſettl in jointure on the ſaid Anna, in caſe ſhe ſhould ſurvive her ſa huſband.

Afterwards, upon the marriage of the ſaid James, the eldc ſon, Sir Alexander, on the 3d of Auguſt 1681, executed a dee of entail of his lands of Newton and others, ſettling the ſame himſelf in liferent, and to James, his eldeſt ſon, and the hei male of his body, in fee; whom failing, to Sir Alexander the e tailer himſelf; whom failing, to Alexander his ſecond ſon, a the heirs male of his body; whom failing, to Patrick his thi ſon, and the heirs male of his body, with ſeveral other ſubſtitu tions of heirs; whom all failing, to Sir Alexander (the entailer his neareſt heirs and aſſignees. The deed contained ſtrict pr hibitory, irritant, and reſolutive clauſes upon the ſaid James a all the other heirs of entail.

Sir Alexander Don, having afterwards agreed with Sir Franc Scott for the purchaſe of the lands and barony of Rutherford, tranſaction of the following nature took place. Alexander t ſecond ſon, and his wife, reconveyed to the father and his hei

t

the foreſaid lands of Broomlands and Ravelaw, and diſcharged the ſaid obligation in their marriage-contract; and Sir Francis Scott, in 1682, diſponed and conveyed the ſaid lands and barony of Rutherford to Sir Alexander Don himſelf in liferent, and to Alexander the ſecond ſon and the heirs male and female of his body, "*whom failing to the ſaid Sir Alexander Don and his heirs* "*male of tailzie and proviſion contained in his infeftment of the barony* "*of Newton with and under the conditions, proviſions, and limitations* "*therein contained.*" In this deed, executed by Sir Francis Scott, the purchaſe-money, being 5500*l.* ſterling, is mentioned to be paid by "Sir Alexander Don for himſelf and in name and behalf of "Alexander Don his ſon."

After the death of Sir Alexander, in 1686, his eldeſt ſon Sir James, and his ſecond ſon Alexander (afterwards Sir Alexander) entered upon and poſſeſſed the ſeveral and reſpective eſtates ſo provided to them by their ſaid father.

Sir Alexander Don of Rutherford, in 1710, executed a new deed of entail of that eſtate, ſettling the ſame to himſelf and the heirs male and female of his body, whom failing to the appellant, the third (*a*) ſon of Patrick Don, old Sir Alexander's third ſon, and the heirs of his body: and afterwards died on the 15th of Auguſt 1712.

Sir James Don of Newton, being now alſo dead, and ſucceeded by the reſpondent, his ſon and heir, a competition aroſe between the reſpondent and the appellant for the eſtate of Rutherford. The reſpondent brought an action of declarator againſt the appellant before the Court of Seſſion, claiming the eſtate of Rutherford under the deed of entail made thereof by Sir Francis Scott, whereby the ſame failing heirs of the body of Sir Alexander the ſon was ſettled upon Sir Alexander the grandfather and his heirs male of tailzie, and proviſion contained in his infeftments of Newton; and contending that the deed executed by Sir Alexander the ſon, under which the appellant claimed, was void, and that Sir Alexander was expreſsly tied up from making any alienation of his eſtate by the deed under which he poſſeſſed the ſame. The appellant appeared and made defences, and the Court, on the 20th of January 1712 13, "Found that the reſpondent was "next heir of entail of Rutherford by the failure of the heirs of "Sir Alexander Don of Rutherford his body; and that the "clauſe in the entail of Rutherford mentioning the prohibitory "and irritant clauſes in the entail of Newton, hath reſpect to Sir "Alexander Don of Rutherford, and the heirs of his body, as "well as old Sir Alexander Don of Newton, and the heirs after "him, and that the ſaid entail of Newton, referred to in the entail of Rutherford, is the laſt inveſtiture in 1681; and that the "diſpoſition of Rutherford, bearing the price to be paid by Sir "Alexander Don the elder, and the right taken to him in life-"rent, and to his ſon in fee, the fee was ſo qualified in the "perſon of the ſon, that he could not gratuitouſly alter the or-

(*a*) The reſpondent's caſe ſays the ſecond ſon.

"der

" der of ſucceſſion; and therefore decerned in favour of the re-
" ſpondent."

The appellant having reclaimed, after a rehearing of the cauſe on the 5th of February 1712-13, the Court " adhered to their for-
" mer interlocutor, and found that the clauſes irritant in the en-
" tail of Newton, not being verbatim expreſſed, but related to
" in the entail of Rutherford, does affect the entail of Rutherford
" ſo as Sir Alexander Don of Rutherford could not gratuitouſly
" alter the ſucceſſion, and that the entail of Rutherford relating to
" the conditions, limitations, and proviſions in the entail of New-
" ton does alſo comprehend the irritancies in the entail of Newton."

Entered, 28 May, 1713.

The appeal was brought from " certain interlocutory ſen-
" tences, or decrees, of the Lords of Council and Seſſion of the
" 20th of January and 5th of February 1712-13."

Heads of the Appellant's Argument.

By the reconveyance and diſcharge made by Sir Alexander the ſon and his wife of the ſaid eſtates of Broomlands and Ravelaw, &c. ſettled, or agreed to be ſettled, by their marriage-contract, Sir Alexander the ſon was and ought to have been adjudged the real purchaſer of the ſaid barony of Rutherford; and therefore, according to the laws of Scotland, he had power to ſettle and diſpone the ſame as he thought fit, as he might the ſaid eſtates of Broomlands and Ravelaw, if they had not been reconveyed.

Though Sir Alexander the ſon had not been ſuch real purchaſer, yet the clauſe in the entail of Rutherford, referring to the entail of Newton, could not properly be underſtood otherwiſe, than for limiting the eſtate of Rutherford, in caſe of Sir Alexander the ſon's death without iſſue to Patrick the appellant's father, who in the entail of Newton, is mentioned next ſubſtitute, or in remainder after the ſaid Sir Alexander the ſon and his heirs male.

And, however this might be, though Sir Alexander the ſon might by the irritant or prohibitory clauſes in the ſaid deed referred to, be reſtrained from ſelling, contracting debts, or doing any acts whereby the eſtate might be evicted from the family by a ſtranger, yet he could not by any thing therein contained be debarred from altering or interrupting the courſe of ſucceſſion thereto in his own family.

Heads of the Reſpondent's Argument.

Whatever tranſactions were betwixt the father and ſon, it is certain that old Sir Alexander Don, was the purchaſer of the eſtate of Rutherford; he paid the price, he took the eſtate to himſelf for life, to him the deeds relating to that eſtate were to be delivered, and to him the warrandice was granted. And ſince the ſaid eſtate was ſold conditionally, and Sir Alexander the ſon accepted of, and poſſeſſed by that deed, the appellant who claims under him, can be in no better circumſtances. Sir Alexander the grandfather, then, being the purchaſer, might diſpoſe of and ſettle his eſtate in what way and manner he pleaſed; and he having expreſsly

expreſsly granted it under the conditions, limitations, and reſtrictions, contained in the infeftment of Newton, whereof this was one, that neither he who was inſtitute, nor any of the ſubſtitutes, ſhould be capable to do any deed to the prejudice of any of the ſubſtitutes, Sir Alexander the ſon, was no doubt tied up from doing any deed to alter the order of ſucceſſion, and conſequently the deed under which the appellant claims is void.

Though, as the appellant contended, the reſpondent could not be ſerved heir to old Sir Alexander, who became merely a life-renter, yet he is in the true genuine ſignification of the word his heir, that is univerſal ſucceſſor to him: to the reſpondent alone ought the lands of Rutherford by the ſaid deed to deſcend: he alone is Sir Alexander the grandfather's heir male, being his grandſon by his eldeſt ſon: he alone is heir of entail, and proviſion of the eſtate of Newton, the ſame being limited to him in the firſt place, and as ſuch he has ſucceeded to, and now is in poſſeſſion of theſe lands. And the deſcription in the deed of ſettlement of the Lands of Rutherford, whereby the ſame are limited upon the failure of the iſſue of Sir Alexander the ſon, to Sir Alexander the grandfather's heirs male and of entail and proviſion in the lands of Newton can poſſibly agree to nobody elſe but the reſpondent.

If the word heir was taken in ſo reſtricted a ſenſe as the appellant contends it could be of no import to him, ſince Sir Alexander the father having died, when he was but life-renter, the appellant no more than the reſpondent could be *heir* to him. For the only caſe in which Sir Alexander the grandfather could have an heir ſerved to him, was upon the event of the reverſion of the eſtate of Newton to him, upon failure of iſſue male by his eldeſt ſon, but even in that caſe the reſpondent has a good claim, being Sir Alexander the grandfather's right heir, and as ſuch the laſt in ſubſtitution mentioned in the ſaid deeds of ſettlement.

The reſpondent's claim is not only founded upon the expreſs words of the deed, but upon the preſumed will of the donor, who having acquired a conſiderable eſtate, did mutually entail the eſtates that he granted to his eldeſt and ſecond ſons, expreſsly tying them both up from doing any thing in prejudice thereof, deſigning (as he expreſſes it in the recital of thoſe deeds) *the continuation of his memory and family*: and were there any doubt, as there is not, the preſumed will of the donor is of great weight, and the rule in ſuch caſes.

The appellant objected that the irritant clauſes, &c. were not expreſſed, but only referred to in the entail of Rutherford, and ſo not binding, but this is contrary to all the known rules and principles of the law of Scotland, by which ſettlements are very often made to have relation not only to deeds already executed, but to ſuch as may be executed; and in this caſe, Sir Alexander the grandfather having made that ſettlement of the lands of Newton, and a very few months after this of Rutherford, he could not have better expreſſed his intention, that the ſeveral heirs of entail ſhould be tied up from alienating the eſtate, than by making it under all the conditions, limitations and reſtrictions, mentioned in

in the firſt deed, which had been duly publiſhed and inſerted in th publick records of the kingdom.

Judgment, 14 July, 1713. After hearing counſel, *the queſtion was put "whether the ſai "interlocutory ſentences, or decrees ſhall be reverſed," it was reſolve in the negative :* (a)

Ordered and adjudged that the petition and appeal be diſmiſſed, and tha the interlocutory ſentences or decrees, therein complained of, be affirmed.

(a) Nothwithſtanding the form of this judgment, it is not therefrom to be underſtoo (as I believe,) that the judgment had been oppoſed: this is the common form of puttin the *queſtion* on every judgment on appeal.

Caſe 22. George Lockhart Eſq; - - - *Appellant*;
John Cheiſly of Kerſewell, Writer in Edinburgh, Margaret Pow, William Montgomery, Walter Cheiſly, and William Bertram, - - - - - *Reſpondents*

7th *May* 1714.

Non-entry.—A Superior having obtained a general declarator of non-entry, hi agent in a ſubſequent ranking reſtricts the ſuperior's intereſt ſo as to be ranke poſterior to annual renters. On a reduction by the ſuperior on the head o leſion and as being *abſens reipublicæ cauſa*, the ranking is ſuſtained.

Ranking and Sale.—It is not relevant to reduce a decreet of ranking, that poſte rior to the date of the decreet the intereſts of certain creditors were produced and ranked, and yet no new decreet put up in the minute-book.

JOHN CHEISLY deceaſed, late huſband of the reſponden Mrs. Pow, was vaſſal in the lands of Kerſewell, of which th appellant was ſuperior; and he was alſo indebted to the appellant

Theſe lands being much incumbered, Mr. Cheiſly's ſon anc heir, the reſpondent John, did not enter as heir to him and there being ſeveral creditors upon the ſaid eſtate who claimed by different titles, an action of ranking and ſale for determining the preferences of the creditors, and for ſelling the lands for their ſatisfaction, was brought before the Court of Seſſion.

Pending this action, the appellant brought a declarator of non-entry againſt the reſpondent, the heir, before the Court of Seſſion, but he did not call the creditors as parties. The court in that action pronounced an interlocutor declaring that the ſaid lands had been in non-entry, and in the hands of the appellant ſince the death of the laſt poſſeſſor, and were to continue in the appellant's hands till the entry of the heir, and that thereby the rents, duties, and profits of the ſaid eſtate, from the 18th of January 1702-3, did belong to the appellant. But afterwards the appellant, having ſundry ſums due to him and thoſe under whom he claimed, by adjudication upon the ſaid eſtate, agreed and conſented in his action of declarator to reſtrict his claim ſo far as only to remain a ſecurity for payment of the ſeveral ſums due to him, he being firſt paid; and after making this reſtriction the Court gave judg-

ment accordingly on the 1ſt of January 1709, and in theſe terms decree was extracted.

Afterwards, however, in the proceſs of ranking and ſale, Mr. Montgomery, ſince deceaſed, then the ſecond huſband of the reſpondent Margaret Pow, who was entruſted with the ordinary management of the appellant's affairs, as his agent, and held his factory, conſented and agreed on behalf of the appellant, when the preferences came to be adjuſted, that the appellant's claims as a creditor by adjudications ſhould be preferred to the adjudications of all perſonal creditors, but poſtponed to the claims of the creditors *annual-renters*, or creditors by voluntary real ſecurity. And accordingly the decree of ranking was pronounced on the 7th of February 1710-11, whereby the reſpondents, Pow, Montgomery, Walter Cheiſly, and Bertram, amongſt others as annual-renters, were preferred in payment to the appellant: This decree alſo was extracted.

The reſpondent Pow's title was by her marriage ſettlement, whereby ſhe had 50*l. per annum* ſecured to her by her ſaid former huſband, John Cheiſly, deceaſed, payable out of the ſaid lands of Kerſewell. The reſpondent Montgomery's claim out of the ſaid eſtate was for arrears of the ſaid reſpondent Pow's jointure, accruing in the lifetime of her laſt huſband Mr. Montgomery, whoſe repreſentative the reſpondent Montgomery was.

The claims of the other reſpondents, Walter Cheiſly and Bertram, were likewiſe as annual-renters or creditors by real ſecurity on the ſaid eſtate.

The appellant afterwards brought an action of reduction before the Court of Seſſion, of the ſaid decreet of ranking, as being pronounced while he was *abſens reipublicæ cauſa*, and when he ought to have been decreed the firſt creditor as being entitled thereto, by his decree in the declarator of non-entry; and that though the perſon who appeared for him in the ranking did not claim the preference due to him, yet he had no ſpecial mandate for ſo doing, eſpecially ſince that perſon had particular advantage by ſuch neglect; and alſo that the ſaid decree ought to be reverſed becauſe though it bears date the 7th of February 1710-11, yet ſeveral creditors had their titles determined, though not produced till after the 7th of February.

On hearing theſe reaſons of reduction the Court on the 21ſt of January 1714 "repelled the reaſons of reduction that poſterior "to the decree of ranking, the intereſts of Muir, and the Box-"maſter of Leith were taken in and ranked, and yet no new "decreet was put up in the minute book, in reſpect that "by the taking in and ranking of the ſaid intereſts there was "no new ſcheme or claſs made in the ſaid ranking, but the ſaid "intereſts were only joined unto the claſſes of the creditors that "were formerly ranked poſterior to the appellant; as alſo ſuſ-"tained the defence of *res judicata* againſt the appellant, in re-"ſpect it was not now competent for the appellant upon the "ſaid production made for him in the decreet of ranking to "crave of new a perference to the ſaid creditors that were pre-

" ferred to the appellant in the ſaid decreet of ranking." Th appellant reclaimed, but the Court on the 27th of February there after, adhered to their former interlocutor.

Entered 5 March, 1713-14.

The appeal was brought from " an interlocutor of the Lord " of Council and Seſſion of the 21ſt of January 1714, and th " affirmance thereof," and from " ſeveral orders whereby th " appellant is excluded from a preference to receive his ju " debt."

Heads of the Appellant's Argument.

By the decree of declarator of non-entry the appellant had a undoubted title, to all the rents and profits of the lands during th non-entry of the heir preferable to all other creditors, whic would have amounted to much more than what he claimed, a due to him by adjudication; but the appellant reſtricted hi large claim and uſed it only as a ſecurity to prefer him for hi juſt debts. And though this decree had been extracted, yet i the action of ranking and ſale, while the appellant was in Londo attending the ſervice of the Houſe of Commons, and commiſſio of accounts, and though he had not waved his privilege they pr ceeded in the ſaid matter, and the decree of ranking was extrac ed before the appellant was in the leaſt made privy to it. Th appellant, then, being very much prejudiced by the decree in th ranking, and it being during his abſence, the ſame ought to b reduced, and the appellant found to be entitled to the preferen due to him by the decree of declarator.

Though the perſon entruſted with the ordinary manageme of the appellant's affairs, did neglect or rather wilfully omit claim the juſt preference for the appellant which he had right t yet that fault of his ought not to prejudice the appellant, ſince h had no ſpecial mandate from the appellant ſo to do.

It is plain, too, that the agent had his own private intereſt i view by thus neglecting the intereſt of the appellant. For he him ſelf being a creditor upon the eſtate by an heritable right, and h wife having a jointure of 50*l. per annum* out of the eſtate, ha he claimed the juſt preference for the appellant, he would en tirely have ſunk his own demand and endangered his wife's join ture. To ſave this, he gave a preference to all the creditors wh claimed by a like title with his own to the appellant.

The decree under reduction cannot be looked upon as *res judi cata*, becauſe though it bears date the 7th of February 1710-11 yet three or four creditors are preferred in that decree, who d not ſo much as compear and produce their rights till ſome tim after the date thereof; but it is impoſſible that creditors can hav preference by a decree bearing date before their compearance o production of their rights.

Heads of the Reſpondents' Argument.

Suppoſing the declarator of non-entry ſo well fixed, that th ſame were unexceptionable, yet the reſpondent Pow, will be pre ferable to the ſuperior on account of her jointure; for it is *tri juris* that the terce excludes non entry, as well as the courteſ

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of the husband, these being *usufructus* constituted by law, which do not require for their establishment the consent or deed of the superior, *quia ex jure publico descendunt*. The privilege of wives to terce remains with them, as to their conventional provisions, at least in so far as the said provisions do not exceed the terce. There is no law for depriving wives of the legal security for their conventional provisions, being within the limits of their terce as it is in the present instance.

But the appellant never proceeded further than a general declarator of non entry, which is not sufficient to found a preference of debt; *and that general declarator was in this case obtained by collusion between the superior and the heir of the deceased vassal.* To that suit the respondents were neither summoned nor did they appear therein, and therefore the same cannot operate against them, nor create or found a preference to the appellant in their prejudice without the allowance of the respondents the creditors. For, had these respondents known of this suit it would have been very easy for them to have rendered the same ineffectual, by tendering to the appellant the arrears of the rents and services due to him as superior. And in June 1713, he got payment of, and gave a full and ample discharge, and acquittance for all the rents and services that were due to him as superior of the said lands, which was a plain passing from that decree.

The appellant in fact was not *absens reipublicæ causa*, when the suit first began, which continued for some years. And he was in Scotland several times during the continuance of that suit, and when the decree was extracted: but though he had been absent, yet that can be no objection, because he appeared by his agents in the said suit, and was party to it throughout. His ordinary lawyers were employed in that affair, and insisted in Court upon his titles, which by the law of Scotland implies a letter of attorney or mandate, and is equal to a personal appearance. And Mr. Montgomery had also a letter of attorney from the appellant, to act in all his affairs as if personally present.

The interest of Mr. Montgomery his agent to the respondent Mrs. Pow's jointure was only a temporary concern, determinable as to him, either by his or her death, and it is her this decree of ranking principally concerns, and she has only got the preference to which she was legally intitled: for she was not only preferable as life-rentrix, upon her prior infeftment but upon this separate ground, that her jointure did not exceed her terce, which would have sustained her infeftment against the declarator of non-entry.

The objection to the decree, that several creditors thereby have their rights and titles determined, though not produced till after the date thereof, is *jus tertii* to the appellant. The decree was obtained at his suit, and the error in date, if any was, is but an error arising from the extract or copy, taken from the record at his own charges, and upon his application. Upon a review and examination of the charges expended by Mr. Montgomery, in obtaining this decree, the appellant in Montgomery's book of accounts, gave him a full and ample

acquittance thereof. And he has ever ſince grounded his title ſeveral ſuits upon that decree, according to his preference there and has alſo received ſeveral ſums of money thereupon; and no becauſe in the event he gets not full payment, it is hard he ſhou require the ſame to be reverſed, which would occaſion a new ſu among the creditors, after it has been ſo long acquieſced in, nor there any error in the date; for though theſe titles were produce after the 7th of February, and determined accordingly, yet th could be no ground to reverſe the decree, becauſe there was theret no alteration made therein, and they are only thereby ordered t be added to the other creditors who had right by adjudication and all poſteri or to the appellant, and they were included in th decree of ranking before the Court allowed the appellant to e tract the ſame. Thus, none of the creditors were thereby an ways prejudiced, and the date is regulated by an expreſs order the Court.

Judgment, 7 May 1714.

After hearing counſel, *It is ordered and adjudged, that the petitio and appeal be diſmiſſed, and that the interlocutor, and orders, there complained of be affirmed.*

For Appellant, *Reb. Raymond. Thos. Lutwyche.*
For Reſpondent, *P. King. John Pratt.*

John Cheiſly the heir put in no anſwer to the appeal.

Caſe 23. Michael Ruſſell of London, Merchant, - *Appellant;*
John Cochran of Waterſide Eſq; - - *Reſpondent*

12th *May* 1714.

Preſumption.—A bond is granted for a partnerſhip debt to an individual credit by one partner; the ſame partner afterwards executes an aſſignment of th partnerſhip funds to the creditors in general, bearing to be in full payme and ſatisfaction of the partnerſhip debts; this was recited in a power attorney granted by the creditors; though the aſſignment was not execut by the other partner, it extinguiſhed the bond to the individual creditor.

THE reſpondent, and James Home, Merchant in London deceaſed, being co partners in trade, bought and purchaſe ſeveral quantities of goods from Michael Ruſſell the appellant' father deceaſed; and became debtors to him in ſeveral ſums o money.

After the diſſolution of the ſaid co-partnerſhip, the reſponden on the 21ſt of December 1689, executed a bond to the appellant' father, reciting that there was due to him by the reſpondent an the ſaid James Home a ſum of 695*l.* 13*s.* 5*d.* ſterling, and i being moſt reaſonable that the appellant's father ſhould be full and completely paid, without being put to any charge in proſecu ting for the ſame, or any further trouble than to lend his nam for recovering the ſame out of the partnerſhip eſtate, therefor

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the respondent obliged himself to procure payment to the said Michael Russell, his heirs, or assigns, (they always lending their name as above,) of the said sum of 695*l.* 13*s.* 5*d.* out of the partnership estate, or in default thereof, to pay the same out of the respondent's own proper estate before the 8th of the said month.

The bond was not paid when it fell due; but Home being thrown into prison, various letters were written by the appellant's father to the respondent on the subject of a proposal which Home had made to the partnership creditors of assigning the whole partnership funds to them, in satisfaction of their debts. The parties in the present appeal are not agreed upon the precise import of these letters; but the scope of them was to persuade the respondent to join in executing such assignment: and Home having declined to grant such assignment first, the appellant's father wrote the respondent, that he might execute it.

The respondent accordingly executed a deed, dated the 25th of January 1692-3, whereby, after reciting the several debts due to the appellant's father, and the said other creditors, the respondent did assign to him and them in full payment and satisfaction of their said respective debts, all the debts, money, goods and effects, belonging to the co-partnership. This assignment was transmitted by the respondent to one Ellis, a Merchant, in London, who shewed the same to the creditors. The appellant's father afterwards wrote to the respondent, that he had seen the assignment, and desired the respondent to send an account of the co-partnership estate, where it was, and how to be recovered.

The appellant's father, and the other creditors on the 20th of February 1693-4, executed a factory or letter of attorney, which recited the said assignment made by the respondent, and did for the more effectual recovery of the debts and effects thereby assigned, constitute one George Watson, Merchant, in Edinburgh, their attorney, or factor, with full power to receive, sue, and give discharges for the same. An action was accordingly brought by Watson before the Court of Session to recover the partnership effects and sundry steps taken therein. Home, the respondents' partner, died without executing the said assignment.

The appellant's father lived near twenty years after these transactions, but took no step against the respondent upon the said bond. After his death the appellant brought an action, as his administrator against the respondent before the Court of Session upon the said bond for payment of the said sum of 695*l.* 13*s.* 5*d.* with interest. The respondent pleaded for defence, that the said disposition or assignment executed by him to the creditors, bearing to be in full satisfaction of their respective debts, and which was accepted of by the appellant's father, was an innovation of the bond and equivalent to a discharge thereof.

The Court on the 24th of July 1712, "found that the dis-
" position granted by the respondent to the appellant's said
" father and others, dated the 21st of January 1692-3 posterior
" to the bond granted by the respondent to the appellant's said
" father the 21st of December 1689, bearing expressly to be in

" full ſatisfaction to them, and each of them, of their reſpective
" debts contracted by James Home, each of them for their re-
" ſpective parts, the ſaid diſpoſition extinguiſhed the ſaid bond,
" granted by the reſpondent to the appellant's ſaid father."

The appellant reclaimed, and after anſwers for the reſpondent, the Court on the 24th of June 1713, " adhered to their former
" interlocutor and further found it inſtructed, that the diſpoſition
" was accepted of by the appellant's ſaid father."

Entered, 19 March 1713-14.

The appeal was brought from " an interlocutory ſentence, or
" decree of the Lords of Council and Seſſion of the 24th of July
" 1712, and the affirmance thereof, the 24th June 1713."

Heads of the Appellant's Argument.

The bond having been duly executed, cannot be voided by preſumptions; and nothing but preſumptions can be pretended in this caſe, for the aſſignment does not bear to be in ſatisfaction of the bond; and had it been ſo intended, no doubt the bond would have been mentioned in the aſſignment, and the ſame delivered up and diſcharged. An aſſignment by the reſpondent alone, without the other co-partner, carried no right to the creditors, and that was all they got, for Home never ſigned it. On the contrary, he made an aſſignment of all the funds and effects to one Thomas Man without mentioning the other creditors, and attachments were laid upon the co-partnerſhip effects, by Home and his creditors, ſo that nothing could be recovered upon that aſſignment.

Suppoſing this deed had been in ſatisfaction of the bond (which is ſtill denied) yet the ſame never having been delivered to the creditors can never militate againſt them. The aſſignment was ſent up by the reſpondent to Patrick Ellis; this is acknowledged both by the reſpondent and Ellis upon oath, but there is no proof of its being delivered; Ellis ſwears he believes it was, but cannot be poſitive, on the contrary there is this ſtrong preſumption that it was not delivered, that when the appellant commenced his action, the reſpondent having pleaded this aſſignment in bar to it, he procured the ſaid aſſignment to be delivered up by Ellis, ſo that it muſt have continued in Ellis's hands. Nor is it of moment, that the creditors granted a factory in purſuance of that aſſignment, ſince that was done only to aſſiſt the reſpondent in recovering the co-partnerſhip effects, in oppoſition to the aſſignment granted by the other co-partner. This was done at the reſpondent's deſire, when the aſſignment was not in their hands and they knew not the nature of it. And whatever argument this might be againſt the *other* creditors, can never militate againſt the appellant's father, who only lent his name to this ſuit, as he was expreſsly obliged by the bond.

Heads of the Reſpondent's Argument.

Beſides the recital of the aſſignment, and the factory thereupon granted to Watſon, the reſpondent ſet out certain letters written in 1692, by the appellant's father to him, to obtain from him the aſſignment in queſtion: in theſe he mentioned that the

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had told Home, the other partner, that the reſpondent was willing to aſſign to the ſaid creditors what ſhare of the ſaid effects was in his hands, and perſuaded the reſpondent to a compliance with what had been propoſed in order to a *full end*, which would be acceptable both to Home and the creditors; and telling the reſpondent, that he (the appellant's father) *was a friend to peace though to his loſs*, and that though the creditors ſhould not be *thereby paid their full debts*, yet there would be an *amicable end*, which would *bring eaſe to his mind, though it might be loſs of money to him.* And Home having refuſed to make ſuch aſſignment firſt, the appellant's father did, by letter, deſire the reſpondent to comply alſo in aſſigning firſt, and to ſend up ſuch aſſignment on his part, quickly to put an end *to that concern.* 8 December 1692.

The reſpondent accordingly executed the aſſignment, and by order of the creditors ſent it to Mr. Ellis; by Ellis it was given to the creditors who read and approved the ſame, and delivered it back to him to keep for their uſe, as appeared by a letter written by the appellant's father to the reſpondent, and by Ellis's evidence in the cauſe. After the aſſignment had been ſent to Ellis in London, the appellant's father alſo wrote to the reſpondent, *for perfecting the buſineſs*, to ſend up to Mr. Ellis an account of what money the reſpondent had received and paid with ſeveral obligations or conditional diſcharges which the reſpondent had taken of other creditors for the money which he had paid them, ſaying that he (the appellant's father) and the other creditors would then give diſcharges to both the reſpondent and Home. And this account and conditional diſcharges were ſo accordingly ſent up. 9 February 1692-3.

Nor did the appellant's father, during his life, or any of the ſaid other creditors, (who all of them well knew their agreement and intention, that the reſpondent ſhould be diſcharged on his granting the ſaid aſſignment) ever demand any thing of the reſpondent on account of the ſaid bond, or the ſaid other debts. The appellant, nevertheleſs after his father's death, finding the ſaid bond among his waſte papers, brought an action thereupon againſt the reſpondent, when by the deaths of the ſaid Home, and the appellant's father and others, and the great length of time ſince the ſaid matters had been tranſacted, the reſpondent's defence was rendered more difficult. The appellant firſt denied, that there had been any ſuch aſſignment made to or accepted by his ſaid father, and upon his requiring it, the reſpondent produced upon oath, all the letters which he had received from the appellant's father relative to the ſame. And Mr. Ellis produced the aſſignment itſelf to the Court of Seſſion, and deponed that it came to him under the reſpondent's cover, and that it had been by him delivered to the ſaid creditors, and was by them left in his hands for their uſe.

After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the interlocutory ſentence or decree therein complained of be affirmed.* Judgment, 12 May 1714.

For Appellant, *Rob. Raymond. P. King.*
For Reſpondent, *Tho. Lutwyche. Sam. Mead.*

Caſe 24. Robert Lord Blantyre, and George Seaton of Barnes Eſq; - - - - *Appellants*;
Mr. John Currie, Miniſter of Haddington, - *Reſpondent.*

1ſt *June* 1714.

Teind Court, Miniſter's Stipend.—A Pariſh being diſjoined the ſtipend formerly modified upon the whole, is allocated upon the original remaining pariſh, notwithſtanding the uſe of payment had remained for 50 years, and the ſame after the diſjunction as before.

It was not neceſſary to call the heritors of the new pariſh, as parties.

It was no ſufficient defence, that the ſtipend ſtill remaining was above the minimum ſettled by act of parliament.

A ſtipend is objected to as above the maximum of 1633, c. 19. but this ſtipend is allocated and decreed to be paid.

MR. Robert Ker, Miniſter of Haddington, the reſpondent's predeceſſor, in February 1650, obtained a decree of the then Lords Commiſſioners for plantation of Churches and valuation of Teinds, whereby a ſtipend of three chalders of wheat, and three chalders of barley Linlithgow meaſure, 400*l.* Scots, in money, and 100*l.* Scots for communion elements, was modified and ſettled on Mr. Ker, and his ſucceſſors, miniſters of the ſaid pariſh. This ſtipend was not by any ſubſequent decree allocated or apportioned on the ſeveral heritors, or poſſeſſors of Teinds within the pariſh, but they by ſome voluntary allotment and proportions made and agreed to among themſelves, paid the ſame to Mr. Ker and his ſucceſſors for ſeveral years.

A conſiderable part of the pariſh of Haddington was afterwards, in 1692, by decree of the then Lords Commiſſioners for plantation of Churches and Valuation of Teinds taken away, and made a new pariſh, by the name of the pariſh of Gladſmuir. The ſtipend of the miniſter of Haddington, being thereby diminiſhed about 20*l.* ſterling, this laſt mentioned decree appointed the ſame to be made up out of the free Teinds of the pariſh of Haddington, which were more than ſufficient for that purpoſe. But the then incumbent of the pariſh of Haddington, during his life, never demanded or received from the heritors more than the proportions of the ſtipend which had been in uſe to be paid before the diſjunction of the new pariſh; and the proportions of the ſtipend paid formerly to the miniſter of Haddington, out of the lands diſmembered from the ſaid pariſh were paid to the miniſter of the new pariſh of Gladſmuir.

The reſpondent, was admitted miniſter of the pariſh of Haddington in 1704; and in 1707 he brought an action before the Lords of Seſſion, as Commiſſioners for plantation of Churches and valuation of Teinds, againſt all the heritors and proprietors of lands and Teinds within the pariſh, for allocating and proportioning the ſtipend which had been modified in 1650. The heritors and proprietors having made appearance, inſiſted, that the Earl of Winton and others, within the new pariſh of Gladſmuir, who

who were defenders in the former action of modification, ought to have been made parties. The reſpondent made anſwers, and the Lords of Seſſion, on the 16th of July 1707, "repelled the defence "and found that the whole heritors of the preſent pariſh being "called was ſufficient."

It was afterwards contended, that no action ought to have been brought for augmenting a ſtipend, which the heritors for above 50 years had been accuſtomed to pay. After anſwers for the reſpondent, the Lords of Seſſion, "found that the "uſe of payment by private paction, could not preclude a "locality." No date.

It was further contended, that there ſtill remained a very competent ſtipend, far exceeding the minimum ſettled by act of parliament, being 846*l.* 14*s.* 2*d.* Scots, with a manſe and glebe, and 80*l.* Scots prebend's fee, and graſs of the church-yard, ſufficient for a horſe and two cows; and that if the ſtipend was diminiſhed by the ſeparation, the miniſter's trouble was alſo leſſened. After anſwers for the reſpondent, the Lords of Seſſion on the 26th of November 1707, "repelled the defence." And by an interlocutor on the 7th of Janaury 1707-8, "ſuſtained the ſaid de-"creet of modification in 1650, and found that the ſtipend "modified thereby ought to have been allocated."

They afterwards remitted it to the Lord Ordinary, to hear parties upon their ſeveral rights and to prepare a locality, which having been prepared after ſundry hearings before the ordinary, and reported, the Lords of Seſſion on the 1ſt of February 1709, "approved of the locality made by the Lord of Fountainhall in "ſo far as the ſame continued the former uſe of payment as a "rule *pro tanto*, and for making up what the ſtipend was dimin-"iſhed by the erection of Gladſmuir, ordained the teinds to which "the heritors or proprietors of the lands had no right to be allo-"cated in the firſt place, and the teinds of other men's lands in "tack in the next place." And of ſame date "ordained the "ſaid ſtipend modified in 1650, to be yearly paid to the reſpon-"dent, and his ſucceſſors, miniſters of the pariſh of Haddington," conform to the locality contained in the decree.

By this locality, the whole additional ſtipend was laid upon the teinds of the appellant, to which Walter Lord Blantyre had right as titular of the pariſh.

The appeal was brought from "ſeveral interlocutory ſentences "of the Lords of Council and Seſſion, as Commiſſioners for "planting of Kirks on the behalf of" the reſpondent. Entered, 24 April 1713.

Walter Lord Blantyre dying before the cauſe was heard, the Houſe on the petition of the appellant Robert Lord Blantyre, his brother, and heir, revived the appeal, and ordered him to be made party thereto.

Heads of the Appellants' Argument.

The reſpondent, even after the diſmembering of the pariſh had ſtill remaining a very competent ſtipend, far exceeding what is de-

determined to be the *minimum* of ſtipends by act of parliament. For the ſtipend as it then was, after the diſunion, was about
1617. c. 3. 1200 merks, whereas by act of parliament, 1617. c. 3. the loweſt ſtipend was enacted to be 500 merks, or five chalders of victual, and the higheſt 1000 merks or 10 chalders of victual. It is true, that by another act of parliament 1633. c. 19. the loweſt ſtipend to
1633. c. 19. be allowed is eight chalders of victual, or 800 merks, yet the commiſſioners appointed by that act, have a power granted them even to reſtrict theſe 800 merks, where they ſhall ſee juſt. But neither by that nor any other act, have the Commiſſioners any power or authority to augment any ſtipend above the ſaid 1000 merks or ten chalders of victual, that being the utmoſt extent they were empowered to go; and if the proprietors of the ſaid pariſh out of their tender conſideration and regard to the greatneſs and extent thereof, and conſequently of the incumbent's trouble, had condeſcended to pay him a ſtipend exceeding the higheſt allowed by act of parliament, there could be no manner of reaſon to oblige them to continue that, much more to augment their proportions; eſpecially ſince after the diſunion of the pariſh, the miniſter's care and trouble were diminiſhed, and he had ſtill a ſufficient ſtipend and ought to be therewith ſatisfied.

The ſeveral heritors had been in uſe of payment of a certain quantity of ſtipend, for upwards of 50 years, the proportions therefore ought not now to be heightened; and conſequently no augmentation granted to the reſpondent.

If any augumentation were neceſſary, or if the quota appointed by the decreet in 1650 ſhould ſtill continue the rule, then the whole proprietors, both the preſent and thoſe who were diſmembered, ſhould bear a proportion; for it was againſt reaſon to allocate upon any part the ſtipend modified againſt the whole. Since theſe heritors had procured the ſaid new erection for their own conveniency and advantage, it is unreaſonable that thereby the other proprietors ſhould be ſubjected to the payment of a greater proportion than formerly, and that thoſe who procured the ſaid new erection, ſhould continue ſtill to pay only their former proportion.

Walter Lord Blantyre purchaſed the ſaid teinds after the diſunion of the ſaid pariſh, and finding that the miniſter had at that time a ſufficient ſtipend, he paid an adequate price and valuable conſideration for them.

Heads of the Reſpondent's Argument.

If the reſpondent had had a decree of allocation, as he has not, and though a part of ſuch allocated ſtipend had by the decreet of erection been annexed to Gladſmuir, he could not have been deprived of his modified ſtipend. For though the Lords Commiſſioners had a power of augmenting, they had no power of diminiſhing miniſter's ſtipends; and ſo ſenſible were they of this, that by a clauſe in their decreet of 1692, it was provided, that it ſhould not *prejudice the former ſtipend of Haddington.*

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That ſtipend was about 846*l.* 14*s.* 2d. Scots, with a manſe and glebe, what was ſuggeſted reſpecting the prebend's fee being *untrue*.

The ſtipend being modified, and no allocation or apportioning thereof legally eſtabliſhed, ſuch uſe of payment could not preclude the reſpondent of his right.

The heritors and proprietors of the pariſh of Haddington, as it ſtood at the commencement of this action, being only liable to the payment of the ſaid ſtipend, there was no reaſon that any others ſhould be made defenders.

After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the ſeveral interlocutory ſentences, or decrees therein complained of be affirmed.* Judgment, 1 June 1714.

For Appellants, *Rob. Raymond. John Pratt.*
For Reſpondent, *P. King.*

Hugh Wallace of Ingliſton, - - *Appellant*; Caſe 25.
Sir Alexander Hope of Kerſe, Bart. - *Reſpondent.*

3d, *June* 1713.

Jus Exigendi.—A Lady's jointure being ſecured on certain heritable debts but no inſeſtment taken, the huſband's eſtate is forfeited during *the Uſurpation*, but being afterwards reſtored to his heir, reſerving the claims of the widow and others, and ordering thoſe to refund, who had received grants out of the eſtate: the aſſignee of the widow's executrix had no *jus exigendi* of the ſums received by theſe grants.

Forfeiture under Cromwell's Uſurpation.—The Earl of Forth, and Bramford being forfeited, and his eſtate ſeized, a bona fide creditor of the then government, is paid his debt by a grant out of the Earl's eſtate: on the reſtoration, the Court of Seſſion found that the heir of ſuch creditor was obliged to refund, but their judgment was reverſed in the parliament of Scotland.

This laſt head is only mentioned incidentally but not decided in this caſe.

SIR Patrick Ruthven, Knight, afterwards Earl of Forth and Bramford, by deed bearing date the 29th of March 1637, in conſideration of the great love and affection he bore to Dame Clara Barnard his then wife, and for her better proviſion and maintenance in the kingdom of Scotland, where ſhe was a ſtranger, ſettled an annuity of 2000 merks Scots, *per annum*, on his ſaid lady for her life payable out of his real and perſonal eſtate, at the terms of whitſunday and martinmas by equal portions; the firſt payment thereof to commence at ſuch of the ſaid terms as ſhould happen next after his deceaſe; and for the better ſecuring the payment thereof, he did by the ſame deed aſſign to his ſaid lady, ſo much of the intereſt of the ſum of 110,000 merks due to him by the Earl of Erroll, and of the ſum of 50,000 merks due by the Earl of Southeſk, for which he had heritable ſecurity, over their reſpective eſtates, as would ſatisfy the ſaid annuity. This aſſignment to Lady Ruthven never was completed by infeftment in her favour.

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The ſaid Earl of Forth, and Bramford in 1645, was declared to be forfeited by the then government, for his adherence to the royal cauſe, and his eſtates were ſeized into their hands, ſeveral gifts were made by them out of the ſame to different perſons, and in particular one of 23,036 merks, to Sir Alexander Hope of Kerſe, the reſpondent's grandfather, which he received out of the ſaid debt due by the Earl of Erroll.

The Earl of Forth and Bramford died under the ſaid forfeiture in 1651, leaving the Counteſs his widow, and one daughter the Lady Jane Ruthven, afterwards married to the Lord Forreſter, ſurviving him. In 1661 an act of parliament was paſſed, reſcinding and annulling the ſaid forfeiture, *to the end* the heirs and executors of the ſaid Earl, might enjoy all ſuch eſtate as belonged to him, as if no forfeiture had been. This act was oppoſed in the extracting and execution thereof, by Sir Alexander Hope and others, who had intromitted with the eſtate of the ſaid Earl, and ſuch extracting and execution were ſuſpended by ſeveral acts of parliament for ſeveral ſeſſions following (*a*), but on the 20th of Auguſt 1670, another act of parliament was paſſed, whereby the ſaid act reſciſſory was ordained to be extracted; which was accordingly done.

An agreement was ſoon after entered into between the Counteſs of Forth and Bramford, and the Lord Forreſter and his Lady, for an equal diviſion of the ſaid Earl's eſtate between them. But a repreſentation being made to parliament in 1672 by Lord and Lady Forreſter and Edward Ruthven their ſon, ſtating that they had been ſurpriſed into the ſaid agreement, another act was paſſed, whereby his Majeſty and eſtates of parliament declared their intention to have been, that for ſupporting the honour of the ſaid Earl's family, he the ſaid Edward Ruthven, the ſon of the Lord and Lady Forreſter, ſhould be entitled to the whole eſtate of the ſaid late Earl; and therefore the agreement was thereby reſcinded and made void, decreeing the ſaid Earl's eſtate to belong entirely to the ſaid Edward Ruthven, reſerving a liferent of the half thereof to Lord and Lady Forreſter; and ſaving to the ſaid Counteſs any right of terce due to her as relict, or any proviſion in her favour by contract of marriage with her ſaid huſband, and any action competent to her for ſuch ſums as ſhe had expended profitably for behoof of the ſaid Lord Forreſter or his Lady.

An action was afterwards brought before the Court of Seſſion againſt Sir Alexander Hope the reſpondent's father, for the ſaid 23,036 merks, received as before mentioned, with intereſt for the ſame (*b*). In this action a decree was made on the 15th of November 1672, decerning Sir Alexander Hope, the reſpondent's father, to make payment of the ſaid ſum of 23,036 merks and 14,000*l.* Scots of intereſt for the ſame, to that time, with intereſt

(*a*) Theſe expreſſions ſhew that acts of parliament of that nature were conſidered in Scotland, at that period, only in the nature of decrees.

(*b*) Stair's Deciſions, 9th January 1674. Sir Geo. Mackenzie's Works, vol. i. *Pleadings*, p. 52. No. 8, folio edit.

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to grow due in time coming to the ſaid Edward Ruthven, reſerving the liferent of the half thereof to the Lord and Lady Forreſter, and alſo reſerving to the Counteſs what ſhe could claim by her marriage contract in terms of the ſaid act of parliament; and likewiſe decerning that the ſaid Counteſs, or Lord and Lady Forreſter ſhould not bring any action againſt the reſpondent's father, for what he ſhould pay to the ſaid Edward Ruthven. And a ſubſequent decree was given againſt the reſpondent himſelf to the ſame effect in 1677.

In 1690 the reſpondent brought his appeal before the parliament of Scotland (according to the method then practiſed,) againſt the ſaid decrees of 1672 and 1677, upon the ground that his father had been a bona fide creditor to the uſurping government and that he had received the ſaid ſum as payment of a debt, and not as a gratuity and that though the act of parliament did appoint reſtitution to be made by all ſuch as had received any of the ſaid ſums of money, though even by warrant from the government, yet that was to be underſtood of ſuch only who had received the ſame gratuitouſly, and not of ſuch as were creditors who were not concerned out of what fund the government paid them; and in this caſe the money was paid to the curators of the reſpondent's father when a minor. This matter having been ſeveral times under the conſideration of the ſaid parliament, they on the 12th of July 1695, remitted the ſame to the Court of Seſſion to review the ſaid decrees, and determine finally therein. The cauſe was heard ſeveral times before the Lords of Seſſion, and on the 18th of February 1697 (*a*), the Court ſuſtained the reaſons of reduction againſt the decrees of Seſſion obtained in 1672 and 1677, and reduced the ſame particularly upon this ground, that in the ſaid decrees this defence was repelled, that *qui ſuum recipit conditione non tenetur*, and that the reſpondent's father being creditor to the goverment *bona fide* for the time for onerous cauſes, what he had received was for payment of his own debt by warrant and order from the government then having authority, ſo that in effect it was the government who was receiver and not the reſpondent, who was not bound to take notice out of what funds he got his payment. And afterwards the Court, on the 16th of February 1698, adhered to their former interlocutor, and aſſoilzied the reſpondent from any further payment of the ſums craved by him to be reduced, than what was already paid, and reduced the foreſaid decrees as to the ſurplus, without prejudice to the reſpondent to inſiſt for repetition of what he had paid.

The Counteſs of Forth and Bramford executed a teſtament on the 21ſt of Auguſt 1676, in which ſhe appointed Janet Urrie her executrix, and died in Auguſt 1679. Janet Urrie having confirmed the ſaid teſtament, did, by a deed on the 3d of May 1680, for the cauſes therein ſpecified, aſſign to the appellant all her right and title to the arrears of the Counteſs's annuity, and in and to

(*a*) *Vide* Fountainhall of that date.

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the bond of proviſion, the decree of 1672, and all other writs and evidents relative to the ſame.

In November 1713 the appellant commenced his action against the reſpondent, before the Court of Seſſion, for payment of the ſaid ſum of 23,036 merks, and 14,000*l.* Scots as the interest thereof to the 15th of November 1672, with all intereſt that had grown due ſince that time, or ſo much thereof as might be ſufficient to ſatisfy and pay the appellant what was due to him in reſpect of the ſaid annuity, amounting in the whole to the ſum of 64,000 merks and upwards. To this action the reſpondent appeared and made defences; and the Court, by interlocutor on the 16th of February 1714, "Found that by the act of parliament "and decree of the Lords in 1672, Edward Ruthven had the "*jus exigendi* of the ſums due by the reſpondent."

Entered, 22 April 1714.

The appeal was brought from "an interlocutor or decree "the Lords of Council and Seſſion of the 16th of February "1714."

Heads of the Appellant's Argument.

The firſt action againſt the reſpondent's father was brought by the Counteſs; and in that action Edward Ruthven, appearing by his curator for his intereſt.

Both in the act of parliament, and the decree ſubſequent thereto, the Counteſs's right of terce or by contract of marriage was ſufficiently reſerved to her; ſo that her bond of proviſion, which came in place of the marriage contract, was thereby rather ſtrengthened than weakened. Her legal proviſion, therefore, was ſupported by the ſaving clauſe, which could bear no other interpretation than the reſerving and eſtabliſhing thoſe rights in their original force, and was wholly uſeleſs in any other ſenſe; for the Counteſs, without ſuch reſervation, might have ſued the ſaid Edward Ruthven, and all others who had intromitted with the ſaid Earl's eſtate. The ſaid decree, too, was only relative to and to be explained by the ſaid act in 1672; by which, though the ſaid Edward Ruthven was preferred to the ſums, to which the Counteſs before that act had right by her contract, and to the fee of the whole ſums, and the right of exacting payment thereof eſtabliſhed in his perſon both by the act and decree; yet that right was expreſsly burdened with the reſervation in the Counteſs's favour. And more eſpecially as to the intereſt of the ſums in queſtion, received by the reſpondent's predeceſſor, there can be no doubt of her preference, for the ſame had been particularly aſſigned to her by her ſaid deed of proviſion, and were reſerved to her by the ſaid act and decree. The preference in the decree being only in reſpect of the principal ſum, ought not to prejudice her as to the intereſt thereof.

Heads of the Reſpondent's Argument.

The Counteſs did not produce any marriage contract, or claim her terce againſt Lord and Lady Forreſter, Mr. Ruthven their ſon, or the reſpondent, though ſhe lived till 1680. Neither did

her executrix, or any claiming under her, bring any action till November 1713, being more than 50 years after the forfeiture was reverſed, though by the laws of Scotland the lapſe of 40 years eſtabliſhes a limitation of preſcription. On the contrary, the ſaid Edward Ruthven brought his action againſt the reſpondent's father in 1672; and, in obedience to the decree pronounced in that action, the reſpondent's father and he himſelf made payment to Edward Ruthven at ſeveral times of about 1300*l.* ſterling.

The act of parliament and decree of the Court of Seſſion in 1672 do expreſsly ordain the right of all ſums of money and eſtate belonging to the Earl of Bramford, or that might be recovered by virtue of the act of reſtitution, to be paid to the ſaid Edward Ruthven, as the party having the beſt right thereto, without diſtinction of principal or intereſt. In the decree of 1672 the reſpondent's father is decreed to pay, not only the principal ſum of 23,036 merks, but likewiſe the intereſt, then amounting to 14000*l.* Scots, and the intereſt that ſhould afterwards grow due. And by the decree in 1677 the payments made by the reſpondent and his father to the ſaid Edward Ruthven are expreſsly imputed to the payment of the intereſt, and not of the principal ſum, which could never have been done, if they had intended by the reſervation in the Counteſs's favour to entitle her to ſue for and receive the intereſt equivalent to her annuity. But the decree in 1677, notwithſtanding the reſervation in favour of the Lord and Lady Forreſter of the liferent of half of the ſums, directed the reſpondent's father to pay the principal and intereſt entirely to the ſaid Edward Ruthven. The reſervation in their favour could afford them action againſt Edward Ruthven; and by the ſame reaſon the reſervation in favour of the Counteſs could not entitle her to an action againſt the reſpondent for the intereſt; but he being obliged to pay the ſame to Edward Ruthven, the Counteſs had an action againſt him; and this the more eſpecially, ſince the Counteſs's right was but a perſonal obligation not completed by infeftment.

If the ſaid reſervation had not been made, it was a queſtion if Edward Ruthven, in whom the eſtate was veſted by an act of parliament, and in effect gifted to him, would have been obliged in the performance of the Earl of Forth and Branford's deeds.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutor or decree therein complained of be affirmed.* Judgment, 3 June 1714.

For Appellant, *Rob. Raymond, P. King.*
For Reſpondent, *J. Jekyll. John Pratt.*

Caſe 26. John Scott of Hedderwick Eſq; - - *Appellant;*
The Magiſtrates and Town Council of Montroſe, - - - - - *Reſpondent.*

5th *June* 1714.

Teind Court.—An Action of valuation being ſuffered to fall aſleep, the miniſter lets a tack of the teinds to the magiſtrates of a royal burgh, and the action being wakened, theſe magiſtrates ought to have been called as parties.

A decree of valuation, obtained on a miſtake as to the rental, ſet aſide and the miſtake rectified.

THE teinds of the appellant's lands of Newbigging were, by decree made by the commiſſioners for plantation of churches and valuation of teinds, in February 1648, ſettled at five bolls barley and 11 bolls of oatmeal. Theſe teinds were anciently part of the revenue of the Biſhop of Brechin; and, upon the aboliti of epiſcopacy, that revenue became veſted in the crown. On t 28th of June 1701, his then Majeſty King William, by his gra ſettled a ſtipend out of the ſame payable to the firſt miniſter Montroſe, and particularly the ſaid five bolls of barley and 11 bo of oatmeal, payable out of the ſaid lands of Newbigging as a p thereof.

In February 1700 the appellant commenced an action befe the then commiſſioners for plantation of churches and valuati of teinds, for a valuation of the teinds of his ſaid lands of Ne bigging; and he called the then officers of ſtate, and Mr. Arra the firſt miniſter of Montroſe, as defenders. After ſome ſte taken in this action, but no appearance made for the defende it was ſuffered to fall aſleep, and continued ſo for ſeveral years.

In the mean time, on the 8th of May 1704, Mr. Arratt t miniſter, upon a contract made between him and the reſponden ratified an aſſignment to them before made, bearing date the 17 of September 1698, of all the teinds due and payable to him l the ſaid decree in 1648; and alſo in corroboration thereof d ſet and in tack let to the reſpondents and their ſucceſſors all t ſtipend and teinds due and payable to him by the ſaid decree 1648, and by virtue of the ſaid grant from his Majeſty, or othe wiſe howſoever: in conſideration whereof the reſpondents becam bound to pay Mr. Arratt a certain annual ſtipend. The reſpo dents, in conſequence of their right acquired from the miniſte received the teinds of the ſaid lands of Newbigging from the a pellant for ſeveral years.

On the 21ſt of April 1707, the appellant wakened his action valuation by a new ſummons to the ſaid Mr. Arratt and the c ficers of ſtate; but the reſpondents were not cited as defende No appearance was made by the parties called, and in Janua 1709 a commiſſion was granted to the provoſt, or any one of t bailies of Montroſe, to take the depoſitions of ſuch witneſſes ſhould be adduced for the appellant to prove the yearly value

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his lands. This commiſſion was executed by one of the baillies, who examined ſeveral witneſſes as to the rental, and the deductions claimed by the appellant, amounting to 88*l.* 13*s.* 4*d.* Scots *per annum*. The commiſſion being reported, with the depoſitions taken thereon, to the Lords Commiſſioners, the appellant, on the 16th of February 1709, obtained their decree in abſence, valuing the ſaid lands of Newbigging at 223*l.* 13*s.* 4*d.* Scots *per annum*, and ſettling the teinds thereof at 44*l.* 14*s.* 8*d.* Scots *per annum*, being a fifth part of the yearly value of the ſaid lands.

Soon afterwards the reſpondents brought an action before the Lords of Seſſion as commiſſioners for plantation of kirks and valuation of teinds, for reduction of the ſaid decreet obtained by the appellant, for that all parties having intereſt, and particularly the reſpondents, had not been cited by the appellant therein. To this action the appellant made defences, and the Lords commiſſioners, on the 2d of July 1712, "found that the principal proceſs of valuation having ſlept, and the defender having approved of the miniſter's aſſignment to the purſuers by paying his teinds to them before the wakening thereof they ought to have been cited by a proceſs; but before reducing ordained the reſpondents to give in a rental of the ſaid lands, that it might appear whether the ſaid valuation was made with a diminution of the rental or not."

The reſpondents, in the further courſe of the action, ſtated, that they might have proved the rental of the ſaid lands to be 100 bolls and 20 merks money, and that the interrogatories which had been put to the witneſſes were contrived for diminiſhing the rental on pretence of allowances which the appellant had at that time made to his tenant after two years of dearth and ſcarcity. The Lords, in December 1712, allowed the reſpondents yet to prove, that the ſaid lands could, at the time of leading the ſaid valuation, pay 100 bolls over and above the deductions allowed in the ſaid decree; as alſo to prove the value of the ſaid deductions at that time; and to the appellant to make what proof he could in ſupport of theſe deductions.

A commiſſion was thereupon granted, and ſundry witneſſes being examined, and a report made to the Lords Commiſſioners, they by interlocutor on the 11th of February 1712-13, "found that the reſpondents had not proved in terms of the act; but found that in their former decree the allowances made in the ſaid valuation were deducted from 80 bolls, which ought to have been deducted from 100 bolls, and therefore reduced the ſaid decree as to ſo much thereof, and declared the teinds of the appellant's lands of Newbigging to be 61*l.* 8*s.* Scots for that year, and in all time coming."

The appeal was brought from "an interlocutor or decree of the Lords Commiſſioners for plantation of kirks and valuation of tithes of the 2d July 1713, and of a ſentence or decree of the ſaid Lords on the 11th of February following." Entered, 15 March 1713-14.

Heads of the Appellant's Argument.

The appellant having ſummoned every perſon who had intere in the ſaid teinds at commencing his action, as law requires, an particularly the miniſter, he was not obliged to have ſummone every perſon to whom the miniſter's right might be conveye The appellant conceives, that his paying the teinds to the reſpo dents upon their right from the miniſter does not alter the caſ for it was a matter of indifference to the appellant to whom h paid the teinds, and no doubt he muſt have paid to the miniſter attorney if he had ſo ordered. The reſpondents themſelves we employed by the Lords Commiſſioners to examine the witneſſe who proved the value of the appellant's eſtate and teinds, ſo th they were fully appriſed of the action, and might have appeare and pleaded for their intereſt if they had thought fit. Never, b fore the appellant's caſe, was any perſon obliged to ſummon all whom the defender might think fit to make over his right, durir the dependance of a ſuit: and, by the civil law, defenders are e preſsly diſenabled from conveying their rights to a greater or mo powerful party, during the ſuit.

(The appellant alſo gives a ſtatement of facts, ſaid to be prov on his ſide, which are traverſed or totally denied on the oth ſide.)

Heads of the Reſpondents' Argument.

All the parties having intereſt, and particularly the reſponden who by virtue of their ſaid contract and leaſe were in poſſeſſi of the ſaid teinds, and to whom the appellant had paid the ſam not having been made parties to the appellant's action of valuatio the decree pronounced therein was null and void. And thou it might not have been proper to have named them in the ſun mons of wakening, yet ſince their right was ſufficiently known the appellant he ought to have cited them by another proce And their contract was ſo far from being a factory or letter attorney, that it was an abſolute leaſe; and in all actions of th nature leſſees are to be called. In the preſent caſe there were perſons who had any right to defend but the reſpondents; the m niſter was not concerned how the teinds might be valued, for t reſpondents were obliged to pay him the ſame rent or ſtipe during his incumbency, without regard to any valuation, a therefore the miniſter never made any appearance to the appe lant's action. Though one of the baillies of Montroſe did ex cute the commiſſion in that action, he did it not as one authoriſ by the reſpondents, or as a magiſtrate of the burgh, but as a priva perſon without their concurrence; and therefore this ought n to prejudice the reſpondents.

(The reſpondents alſo give a ſtatement of facts, ſaid to ha been proved on their ſide; as nothing can be given diſtinctly theſe, the ſtatements are not detailed on either ſide.)

Judgment, 5 June 1714. After hearing counſel, *It is ordered and adjudged, that the petiti and appeal be diſmiſſed, and that the interlocutors or decrees therein co plain*

plained of be affirmed: and it is further ordered, that the appellant do pay or cauſe to be paid to the reſpondents the ſum of 40l. for their coſts in this Houſe.

For Appellant, - *Edw. Northey, John Pratt.*
For Reſpondents, *Rob. Raymond, P. King.*

Caſe 27.
Dalrymple, 21 & 29 Nov. 1705. Fountainhall, 29 Nov. 1705. Forbes, 21 & 29 Nov. 1705.

Grace and Rachel Douglas, Daughters of the deceaſed James Douglas of Earnſlaw, for themſelves and as Aſſignees of Mr. Alexander Douglas their Uncle, and Lieut. Robert Douglas their Brother, - *Appellants;*

John Montgomerie, Hugh Paterſon, James More, and others, Creditors of the ſaid James Douglas deceaſed, - - *Reſpondents.*

18th *June* 1714.

Fiar.—An eſtate being ſettled by an heireſs to her huſband and herſelf in conjunct fee and life-rent and the heirs to be procreated between them in fee, whom failing to the huſband, his neareſt lawful heirs and aſſignees; the huſband was fiar.

Donatio non præſumitur.—The fee taken up by a daughter as heir to her father, where a diſpoſition had been made to a ſon (deceaſed), upon which infeftment had followed, but never cloathed with poſſeſſion nor recorded.

Adjudication.—A charge being given to a ſon to enter heir to his uncle and mother, and adjudication being led thereon; but the father being afterwards found to be fiar, the firſt adjudication is reduced.

The ſaid ſon refuſing to ſubject himſelf to his father's debts, has no title to quarrel the adjudication led of his father's fee.

JOHN GRADEN of Earnſlaw, in the county of Berwick, the grandfather of the appellant, executed a diſpoſition of that eſtate to his ſon John in fee, with a clauſe of redemption on payment of a ſum of money. Upon this diſpoſition to John the ſon, ſaiſin was taken, but never recorded; and he died before his father, under age and without heirs of his body.

The father dying alſo, Grace Graden his daughter ſerved herſelf heir to him as laſt veſt and ſeiſed in the eſtate, and was thereupon infeft on the 1ſt of January 1664. Afterwards, by contract of marriage, dated the 27th of January 1668, between Mr. James Douglas, and the ſaid Grace Graden, in conſideration of a marriage intended to be had between them, James Douglas obliged himſelf, his heirs, &c. to lay out 20,000 merks in lands or other ſecurities, to be ſettled to himſelf and the ſaid Grace in conjunct fee and life-rent, and to the heirs of their two bodies: and the ſaid Grace Graden alſo thereby diſponed the ſaid lands of Earnſlaw, "To Mr. James Douglas in life-rent and to the "heirs to be procreated between the ſaid Grace Graden and him "in fee, whom failing to the ſaid Mr. James Douglas, his own

" neareſt heirs and aſſignees whatſoever, with the proviſion and " condition of the ſaid Grace Graden her own life-rent."—In the procuratory of reſignation and precept of ſaſine, this deſtination was not verbatim repeated, but theſe mentioned, that ſaſine was to be given " To Mr. James Douglas and Grace Graden, " and longeſt liver of them two, in conjunct fee and life-rent, " and the heirs to be procreated between them, in fee, whom " failing to the ſaid Mr. James, his neareſt and lawful heirs and " aſſignees." This marriage accordingly took effect, and on the 28th of February 1668, a crown charter was obtained of the ſaid lands of Earnſlaw, ſettling the ſame in manner as in the ſaid procuratory of reſignation and precept of ſaſine; and upon this charter infeftment was taken upon the 17th of April 1670, and the inſtrument of ſaſine duly recorded. Afterwards on the 1ſt of October 1673 reſignation was made by Grace Graden in the hands of the crown for a new infeftment to the ſaid James Douglas and Grace Graden *in conjunct fee and life-rent*, and the heirs to be procreated between them in fee, whom failing to the ſaid Mr. James, his neareſt and lawful heirs and aſſignees; and in terms thereof a new charter was procured from the crown and infeftment taken thereon and alſo recorded.

James Douglas having contracted conſiderable debts, which came to be veſted in the perſon of one Alexander Paterſon, he by an aſſignment, on the 15th of February 1686, made over the rents of the ſaid eſtate to Mr. Paterſon, at the then conſtituted rental, (which was inſerted therein) for payment of the intereſt of the ſaid debts in the firſt place, and afterwards towards ſatisfaction of the principal ſums; with a power to Paterſon to make and renew tacks without diminution of the ſaid rental. Paterſon afterwards brought an action of adjudication againſt James Douglas on ſeveral debts which he claimed as due to him; and on 8th of November 1698 obtained decreet therein adjudging the ſaid lands to him, and he thereupon alſo obtained a charter of adjudication from the crown.

BIBLIOTECA·BODLEIANA·

James Douglas ſoon after died, leaving iſſue of the ſaid marriage a ſon Robert, and the appellants Grace and Rachael Douglas—The ſaid Mr. Paterton being indebted in conſiderable ſums to the reſpondents, he conveyed his right to the ſaid lands to his nephew Robert Anderſon, with a proviſo for payment of his debts. This Robert Anderſon was ſerved heir to Mr. Paterſon after his deceaſe, and obtained a charter of adjudication in his own favour on the 1ſt of March 1700, on which he was infeft and he afterwards conveyed all his right to the ſaid lands, under a ſimilar proviſo with that above-mentioned to Alexander Anderſon his brother, and this Alexander was duly infeft therein.

An oppoſition, however, was now ſtarted to the rights of the creditors of James Douglas. Robert his ſon, on the 12th of December 1699, granted a bond to Mr. Alexander Douglas his uncle for the ſum of £2000 ſterling. Upon this bond Alexander the uncle gave Robert a charge to enter heir in the ſaid lands of

Earnflaw to *John Graden his uncle* and Grace Graden his mother; and upon Robert's renunciation, he obtained decree of adjudication in his favour.

And the ſaid Alexander Anderſon brought an action before the court of ſeſſion to reduce this laſt mentioned adjudication; and in this action he called the ſaid Alexander Douglas and Robert Douglas as defenders. It was contended on the part of theſe defenders, that by the marriage contract between the ſaid James Douglas and his wife, the lands of Earnflaw were only conveyed to him in life-rent; and conſequently that no debts contracted by him, nor any adjudications thereon could affect the eſtate in prejudice of the heirs of the marriage in whom the fee was veſted. After ſundry proceedings, the court on the 20th of November 1705 "found, that by the contract of marriage with "the charters and ſaſines following thereupon, Mr. James "Douglas the huſband was liar of his lands and others contained "in the ſaid contract."

It was then contended on the part of the defenders, that though by virtue of the marriage contract, the huſband might have the fee of the eſtate, yet his only right being by conveyance from Grace his wife, ſhe herſelf had no right, for ſhe was only ſerved heir to John Graden her father, but the father had before that time conveyed his eſtate to his ſon, who was infeft therein; and this eſtate was now *in hæreditate jacente* of the ſon, and could not be conveyed by Grace to her huſband:—Upon this point the court on the 29th of November 1705 "repelled the defence "founded on the diſpoſition granted by John Graden to his ſon, "with the ſaſine following thereupon, in reſpect the ſame were "not cloathed with poſſeſſion, and the ſaſine not regiſtrate, and "therefore reduced the ſaid rights, and preferred the purſuer "Mr. Anderſon, and the creditors of Mr. Alexander Paterſon." The defenders Meſſieurs Douglas reclaimed, and inſiſted further that thoſe claiming under Paterſon ſhould count and reckon for their intromiſſions with the eſtate:—The court on the 7th of December 1705 "adhered to their two former interlocutors, but "decerned the ſaid creditors to produce the grounds of their "debts and adjudications thereupon, and allowed the petitioners "to ſee the ſame, and remitted to the lord ordinary to hear the "objections againſt the ſaid adjudications and the allegations "of payment of the ſums contained in Mr. Alexander Paterſon's "adjudications."

Parties having accordingly gone before the ordinary, it was objected, that as the defender's adjudication proceeded upon a charge to enter heir to John and Grace Graden his uncle and mother, the ſame was void; and that unleſs the defenders would ſubject themſelves to the payment of James Douglas's debts, or ſerve themſelves heir to him, they had no title to queſtion the rights of the creditors. The Lord Ordinary, on the [illegible] February 1706, "found that the defender's adjudication proceeding "only upon a charge to enter heir to John Graden the defender's "uncle,

" uncle, and Grace Graden the defender's mother, and that the " diſpoſition of John Graden the father to John Graden the ſon, " the defender's uncle, and ſaſine thereon being already reduced, " and that the lords have found that the father had right to the " fee of the eſtate, and not the mother, therefore the defender's " adjudication fell in conſequence; and in regard the defenders " refuſed to ſubject themſelves to the purſuer's legal diligences, " and pay off the debts upon this event, therefore reduced the " ſaid adjudication, and decerned that the purſuer had the only " good and undoubted right of property of the ſaid lands of " Earnſlaw, and ordained him to be entered into the quiet poſ- " ſeſſion, and receive the rents thereof, and decerned that the " defenders ſhould not receive any of the rents and profits of the " ſaid lands, or any part thereof, they having no right thereto." And the defenders having reclaimed againſt this interlocutor, the ſame was adhered to by the whole court, and decree was extracted on the 22d of February 1706.

The reſpondents being creditors of Alexander Paterſon and Robert Anderſon before mentioned, afterwards adjudged the ſaid lands of Earnſlaw, and procured a charter thereon from the crown, upon which they were infeft. They afterwards brought an action of ranking and ſale, and called the whole creditors of James Douglas and of Mr. Paterſon, and all claiming under them: And the appellants, as creditors of their father by bond of proviſion, now appeared contending that the reſpondents by receipt of the rents had been fully paid their debts. The court granted a joint commiſſion to both the appellants and reſpondents, to prove the yearly value of the ſaid lands of Earnſlaw and others, and how many years purchaſe the ſame might be ſold at, and the deductions therefrom, and allowed the reſpondents to prove the ſaid Mr. James Douglas, Mr. Alexander Paterſon, and Mr. Robert Anderſon, bankrupts, and ordained the ſeveral creditors to depone to the verity of their reſpective debts. Several witneſſes for the reſpondents were examined, and after ſundry proceedings the court found " that the debts exceeded the value " of the eſtate, and found, that Mr. James Douglas was bank- " rupt in 1578*l.* and that Mr. Alexander Paterſon was bankrupt " in 850*l.* and that Robert Anderſon was bankrupt in 500*l.* " beyond the value of their eſtates, and therefore preferred the " reſpondents to the appellants, and found the appellants' right " null." The preferences of the creditors were afterwards aſcertained, and to theſe interlocutors the court on ſeveral occaſions adhered when reclaimed againſt by the appellants: decree was extracted on the 23d of February 1711.

In purſuance of theſe proceedings the ſaid eſtate was ſold, and the reſpondent James Moore purchaſed the ſame at a publick ſale, paid the price to the creditors, and obtained a charter from the crown on which he was infeft.

Entered 23 April, 1714.

The appeal was brought from " ſeveral interlocutors or decrees " of the Lords of Council and Seſſion, made on the behalf of " James

" James Moore for himſelf and as aſſignee of Hugh Paterſon, and " of others."

Heads of the Appellants' Argument.

By the marriage contract between James Douglas and Grace Graden, there was no greater eſtate granted to the ſaid James Douglas than for his life only. By the whole tenor of the ſaid contract, and more eſpecially by the principal or granting clauſe therein, whereby the grantor's intention is beſt ſeen (other collateral clauſes being left to the writers who often inſert words therein as they think fit) this appears to have been the true intent and meaning of the ſaid Grace Graden the grantor. The debts of the father of the appellants ought not, therefore, to affect the inheritance of the ſaid eſtate in prejudice of Robert Douglas the heir of the marriage.—*Conjunct fee*, eſpecially where the eſtate comes by the wife, as this does, in its largeſt extent ſignifies nothing but life-rent. Were this otherwiſe, in the preſent caſe, it is explained and qualified by the addition of the words *or life-rent*, and by the ſubſequent limitations to the heirs of the marriage in fee, and in default of ſuch iſſue to the heirs of the huſband, which were wholly uſeleſs, if by the words of the firſt limitation the huſband had an eſtate in fee. When any doubt exiſts to whom an eſtate did firſt belong, the ſame is preſumed by law to belong to the man; but here it is evident, the eſtate did firſt belong to the wife: and a huſband may have a conjunct fee of his wife's eſtate, but not an abſolute fee, and at moſt is only a truſtee for the heir of the marriage until he exiſts. The heir, upon his exiſting, has a *jus quæſitum et proprium* in the inheritance of his mother with the burthen of his father's life-rent, and may force the father to aliment him out of the life-rent; and the heir, after the death of his father and mother, needs only to be ſerved heir of line and proviſion to his mother as dying laſt veſt and ſeiſed in the abſolute fee, and could never thereby be made liable to the payment of his father's debts to whom he does not ſucceed as heir.

With regard to the reſignation, charter and ſaſine in 1673; the wife was certainly denuded of all her right to the inheritance by the marriage contract; and ſince, purſuant to that contract, reſignation, charter and ſaſine had been made and granted five years before this ſecond reſignation, the ſecond reſignation was null in itſelf, being obtained without any conſideration from one who had no right.

But even ſuppoſing (which is contrary to the fact,) that by the words of the marriage contract an eſtate in fee might have paſſed, if the ſaid Grace Graden had been ſeiſed of ſuch an eſtate; yet ſhe herſelf could not grant any eſtate to her ſaid huſband. She herſelf had no other eſtate in the ſaid lands, than what ſhe claimed as heir ſerved to her ſaid father, who had no manner of right therein; for the fee thereof was wholly veſted in the ſaid John her brother, who died ſeiſed thereof; and as ſhe did not ſerve herſelf heir to him, who died laſt ſeiſed her

ſervice to her father was void. And this allegation was ſupported in the Court of Seſſion, by a deciſion of their own in another caſe exactly parallel (*a*).

(The appellants alſo ſtate, that Alexander Paterſon had been fully paid his debts, by receipt of rents and profits; they make objections to the rental proved before the Court of Seſſion, and to this decree finding the legal expired, and refuſing to give the appellants their option to redeem.)

Heads of the Reſpondents' Argument.

By the marriage contract, the ſaid lands were conveyed to Mr. Douglas in fee. Even by the diſpoſitive clauſe in the contract of marriage, if the queſtion had turned upon that clauſe alone, the huſband is clearly made fiar of the eſtate. Though in this clauſe of the ſaid contract, the lands are at firſt only conveyed to the ſaid James Douglas in life-rent, yet this clauſe by limiting theſe lands, in remainder to the neareſt lawful heirs, and aſſignees of Mr. Douglas, with a reſervation to the ſaid Grace of her life-rent, without doubt eſtabliſhes the fee in him; for ſhe being only life-renter, and the fee remaining in him and his heirs, the eſtate of inheritance being neceſſarily ſomewhere muſt be in him: and this clauſe if doubtful is to be explained by the other clauſes of the contract.

But though that matter were not ſo clear, yet the charter under the great ſeal and ſaſine following thereupon, which are matter of record, having eſtabliſhed the fee in Mr. Douglas's perſon, the creditors were in *bona fide* to lend money to him, ſince it appeared upon record that the fee of the eſtate was in him, and he not tied up either from contracting debts, or alienating the lands. Nor had the creditors any notice of the contract of marriage, or of the diſpoſitive clauſe therein, nor could they ſince it was not recorded, and of conſequence could not be bound by any clauſe therein contained, though clearly againſt them, as this clauſe is not. And Mr. Douglas did during his life grant leaſes, and exerciſe all other acts of property as any other in whom the fee of an eſtate is could do.

Grace Graden being ſerved heir to John Graden her father in 1663, and retoured, as appears upon record, that ſervice
1617, c. 13. cannot now be queſtioned, ſince by act of parliament 1617. c. 13., no ſervice or retour is queſtionable unleſs within 20 years; and it was more than 40 years before her ſervice was quarrelled. Beſides, the diſpoſition by John Graden, the father to his ſon when under age, with the ſaſine thereon, were revokable at pleaſure; and the father notwithſtanding thereof continued abſolute proprietor of the eſtate, and granted heritable ſecurities thereon, and leaſes thereof, and did all other acts of property, even during the ſon's life, much more after his death, which happened in the father's life-time. So that the ſon dying before the

(*a*) Dirleton's Doubts and Deciſions, *voce Fiar*, Duke and Ducheſs of Monmouth.

father,

father, and a minor, and theſe deeds never being delivered or out of the father's cuſtody, the father notwithſtanding of the deed to the ſon, was *veſt and ſeiſed* in the property of the eſtate, and the ſon's right evaniſhed, and conſequently the daughter was in the right to ſerve heir to her father and take no notice of the ſon. The Court of Seſſion decreed the ſame in a caſe Roſe Fincham, againſt Muirhead of Bradiſholm, which was affirmed upon appeal by the Houſe of Lords. Indeed ſhe could not do otherwiſe than ſhe did, for ſhe could not know of the diſpoſition to the ſon, or the ſaſine thereon, for neither of them were recorded, nor was the ſon ever in poſſeſſion, but died under age, and by the act of parliament 1617. c. 16., all ſaſines are declared void as againſt third parties, if not regiſtered within ſixty days after they are taken. But this ſaſine never was regiſtered and conſequently neither the daughter nor the creditors could know any thing of it; and as ſhe was ſerved heir to her father who died ſeiſed and poſſeſſed thereof, Mr. Paterſon and the other creditors were *in bona fide* to lend money to Mr. Douglas, who claimed under the ſaid daughter, and ſtood publickly infeſt by virtue of a charter under the great ſeal.

No. 2. of this Collection.

1617, c. 16.

(The reſpondents alſo traverſe or deny the facts ſtated by the appellants, with regard to the payment by receipt of rents and as to the proof of the rental.)

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the ſeveral interlocutors or decrees therein complained of be affirmed.*

Judgment, 18 June 1714.

For Appellants, *P. King. N. Lechmere.*
For Reſpondents, *Rob. Raymond, John Pratt.*

Sir Robert Home, Bart. - - - *Appellant*; Caſe 28.
Sir Patrick Home, Bart. - - - *Reſpondent.*

1ſt *July* 1714.

Sequeſtration.—A ſequeſtration, granted of an eſtate, where a perſon was in poſſeſſion by virtue of a tack from his father for payment of debts, adjudications in his perſon with expired legals, and a diſpoſition from an elder brother, which, though reduced for fraud and circumvention, was ſtill to ſtand as a ſecurity for the onerous cauſe thereof.

Preſumption.—From circumſtances of preſumption a perſon is made to count and reckon for property, which with his conſent had formerly been conveyed by a weak elder brother to another perſon.

AFTER the judgment was given in the former appeal (No. 15. of this collection) the parties returned to the Court of Seſſion, and ſundry proceedings were had in the action of count and reckoning. On the 24th of February 1713, the Lord Ordinary found Sir Patrick the reſpondent liable both for the real and perſonal eſtate contained in the diſpoſition, and diſcharge granted to him in

in terms of the judgment of the Houſe of Lords, and ordered him, in terms of an interlocutor of the 18th of November 1691, to account from Martinmas 1671, and to give in a charge againſt himſelf, with his diſcharge and vouchers according to the late act of Sederunt. The reſpondent having reclaimed, the Court on the 2d of July 1713, adhered to the former interlocutor with an addition in theſe words, viz. "in ſo far as concerns the whole "ſubject diſponed by Sir John Home to Sir Alexander his ſon, and "by Sir Alexander with conſent of the reſpondent to George "Home of Kaims."

Act of Sederunt. 22 Nov. 1711.

The appellant thereupon petitioned the Court to have the eſtate ſequeſtrated, and a factor appointed to receive the rents and profits; but after anſwers for the reſpondent, the Court on the 7th of July 1713, unanimouſly "refuſed a ſequeſtration in "this ſtate of the proceſs."

The reſpondent having alſo reclaimed againſt the ſaid interlocutor of the 2d of July, and particularly againſt that part of it which found him liable for what had been diſponed to George Home of Kaims; after anſwers thereto the Court on the 16th of July 1713, "found the reſpondent not accountable for the "contents of the diſpoſition made by Sir John Home to Sir "Alexander, which were diſponed by Sir Alexander with the "reſpondent's conſent to George Home of Kaims."

Entered, 4 May, 1714.

The appeal was brought from "two decrees or interlocutors "of the Lords of Council and Seſſion of the 7th and 16th days "of July 1713."

On the Sequeſtration.—Heads of the Appellant's Argument.

The leaſe granted by the late Sir John Home, was abſolutely a deed of truſt for payment of debts, and to diſburthen the entailed eſtate in favour of the appellant's father and his heirs; and the reſpondent having ſo groſsly broken his truſt, and ſo long avoided to come to an account, it was in law and equity juſt, that the rents ſhould be ſequeſtrated; for ſo long as the reſpondent continued to poſſeſs, it was his intereſt never to make a fair account.

The reſpondent cannot claim the benefit of the leaſe, as he has during the courſe of 43 years failed in the performance of every condition and clauſe to which he was bound, and indeed obſerved nothing ſave his entering to poſſeſs: and ſince in equity and by the law of Scotland, a tenant or leſſee may be removed before the term of his leaſe expires, *ſi male verſatus eſt in re conducta*, the appellant might well inſiſt that the reſpondent ſhould be removed, and that the appellant ſhould have acceſs to poſſeſs. All that the appellant, however, inſiſted for was, that after ſo long a time during which no account had been made, the eſtate might be ſequeſtrated till it ſhould appear in the event who had beſt right.

But the reſpondent having entered by the leaſe muſt poſſeſs by it, and muſt anſwer according to it, *nec potuit ſibi mutare cauſam poſſeſſionis*. If he have other titles, being once removed, he may make uſe of them to recover poſſeſſion, but he muſt firſt be

judged by the leaſe by which he entered. The pretended expired adjudications in his perſon are no titles to keep poſſeſſion for they are led for debts which ought to have been paid by the truſts he undertook. As to the diſpoſition of 1694, it is found to have been gained by fraud and circumvention, and therefore can be no title to continue to poſſeſs, and though it be not abſolutely ſet aſide, but ſo as ſtill to remain as a ſecurity for a debt, it lies on the reſpondent to make out that debt, or valuable conſideration before he can have the benefit of it; for the deed being obtained by fraud it preſumes not, and proves not in law. If there be any valuable conſideration or juſt title, the reſpondent's right will be entire, and in the event of the cauſe, he will have what belongs to him. It is moſt uſual by the practice of Scotland to ſequeſtrate eſtates, where there is a controverſy concerning the titles, and more eſpecially where there is manifeſt delay in coming to an account as there has been in this caſe for 40 years.

Heads of the Reſpondent's Argument thereon.

The appellant and his mother have all along been in poſſeſſion of two thirds of the eſtate. The reſpondent being in poſſeſſion by the leaſe which is to endure till all the debts be paid, he cannot be removed till it appear if the debts are or ought to have been paid, which cannot be done till the count and reckoning be cloſed. The reſpondent has alſo two other titles in his perſon ſufficient to exclude the ſequeſtration, namely, adjudications with expired legals, and ſecondly, the diſpoſition granted by Sir Alexander Home, which by the judgment in the former appeal is not reduced wholly, but is ordered to ſtand as a ſecurity for any onerous cauſe or valuable conſideration paid or made good by the reſpondent for the ſame. The reſpondent has given in his accounts ſigned by him, with the vouchers thereof conform to the late act of Sederunt, whereby, if the ſame ſhall be diſproved, he will be ſubject to be decerned in double of what ſhould be omitted out of the charge. By theſe accounts it appears, that not only the debts due to the reſpondent, and which he has paid, and the valuable conſideration, which was allowed him by the ſaid judgment, doth far exceed not only that part of the eſtate which the reſpondent poſſeſſes, but alſo the value of the whole eſtate: and no ſequeſtration has ever been allowed in a ſimilar caſe. The interlocutor appealed from, being the undoubted law of Scotland, the Court unanimouſly pronounced the ſame without a contrary vote; and the appellant did not offer to reclaim therefrom.

On the Interlocutor 16th July 1713.—Heads of the Appellant's Argument.

At pronouncing this interlocutor the Court were divided in opinion; but they had no power to do otherwiſe than to appoint the reſpondent to account for the contents of the ſaid diſpoſition; for the judgment of the Houſe of Lords does expreſsly order, that the

the reſpondent do account, not only " for the rents and profits " the truſt-eſtate granted to him by Sir John Home by leaſe 1(" May 1671, but for all other ſums of money, debts, or mo " ables contained in the aforeſaid diſcharge and diſpoſition, whi " belonged to the ſaid Sir John Home, and were received by " Patrick Home, and which ought to have been applied for t " debts charged on Sir John's eſtate." Now a conſidera branch of the ſubjects in queſtion is ſpecially contained in t diſpoſition reduced by the former judgment, *viz.* an apprizi over the eſtate of Lammerton, which, though it had forme been conveyed to George Home of Kaimes, is again therein e preſsly conveyed to the reſpondent. And the whole other ſubje in the diſpoſition in queſtion were contained generally in t aforeſaid diſcharge and diſpoſition ſet aſide by the judgment of t Houſe of Lords; for the reſpondent was liable to apply the ſubje in queſtion to the payment of debts within one year after his fathe deceaſe in caſe his brother Sir Alexander did not. And the ſpondent did by fraud and circumvention obtain the foreſaid d charge (now ſet aſide), whereby he is not only acquitted of a account for the rents and profits of the truſt-eſtate, granted him by leaſe, but of his intromiſſion with all debts, ſums of n ney, goods, &c. intromitted with by him, which belonged to t deceaſed Sir John Home.

It was proved in the action below, that although the diſpoſiti was made by Sir Alexander, with conſent of the reſpondent, the ſaid George Home, yet in fact the reſpondent had the poſſ ſion, and accounted with the ſervants entruſted with the mo ables, and otherwiſe applied conſiderable parts thereof to own uſe.

Reſpondent's Argument thereon.

It would be againſt all reaſon to make the reſpondent liable account for Sir John Home's perſonal eſtate, which had be actually diſpoſed of by the appellant's father to George Home Kaimes, for payment of ſome part of Sir John's debt; and t ſaid George Home, as appeared by the evidence of ſeveral w neſſes adduced by the appellant in the action of count and reck ing, had intermeddled with and diſpoſed of the ſame; and p ticularly, it appeared that the ſaid George Home having afterwa aſſigned the ſaid perſonal eſtate to Henry Home his nephew, w a clauſe that he ſhould be accountable to the appellant's fath he the ſaid Henry Home, after his uncle's deceaſe, by his bo dated the 21ſt of January 1681, obliged himſelf to account w and pay to the appellant's father what ſhould appear to be due him from the ſaid George Home. Upon this bond the appellan father afterwards brought an action, before the Court of Seſſi againſt the ſaid Henry Home; and in a count and reckoning h thereupon, the appellant's father gave in a charge, containin particular account of all the perſonal eſtate which had been c poned by his father to him, and by him aſſigned to the ſaid Geo Hom

Home; and the ſaid Henry Home gave in a diſcharge, mentioning the ſeveral debts that were due by Sir John to the ſaid George Home, and which he had paid for him with the vouchers thereof, far exceeding in value the perſonal eſtate which the ſaid George Home had intermeddled with. Several articles having been debated, and a time limited to the appellant's father for proving his charge, and he having failed therein, Henry Home, on the 6th of November 1684, obtained a decree whereby he was freed and diſcharged.

After hearing counſel, *It is ordered and adjudged that the ſaid interlocutor of the 16th of July* 1713, *be reverſed; and that the receipt of George Home of Kaimes, of the contents of the diſpoſition made by Sir John Home to Sir Alexander, which were diſpoſed of by Sir Alexander with the reſpondent's conſent to the ſaid George Home, be taken to be the receipt of the reſpondent; and that the reſpondent do therefore account for the contents of the diſpoſition made by the ſaid Sir John Home to the ſaid Sir Alexander, which were diſpoſed of by the ſaid Sir Alexander, with the reſpondent's conſent, to the ſaid George Home: And it is further ordered, that the Lords of Seſſion do appoint a receiver of the profits of the truſt eſtate in queſtion until ſuch time as the accounts ſhall be taken, in purſuance of this order and the former order of this houſe of the 27th May* 1712; *and do likewiſe order that the tenants of the truſt eſtate do pay the rents now in arrear, and the rents which ſhall grow due for the future, to ſuch receiver: and that ſuch arrears of rent and growing rents as ſhall be paid to ſuch receiver be duly accounted for and placed forth at intereſt, with approbation of the Lords of Seſſion, as ſoon as conveniently may be, for the benefit of ſuch of the ſaid parties as ſhall appear to be entitled thereunto upon the event of the ſaid account.* Judgment, 1 July, 1714.

For Appellant, *Rob. Raymond. Tho. Lutwyche.*
For Reſpondent, *P. King. Sam. Mead.*

Caſe 29. Fountainhall, 23 June 1712. Forbes, 22 July, 1712.

John Falconer Eſq. and others, Creditors of Thomas Craig, late of Riccarton, Eſq. deceaſed, - - - - - *Appellants;*

John Muſhet and others, Creditors of Robert Craig of Riccarton, - - - *Reſpondents.*

3d *July* 1714.

Tailzie.—It being found that, in reſpect an entail, with prohibitory clauſe contained no irritancy of the right of the contravener, the debts of the he in poſſeſſion did equally affect the eſtate with the debts of his predeceſſor: the judgment is reverſed.

An entail executed prior to the act 1685 ſuſtained, though objection ma that it was not regiſtered in terms of that act.

Conſtruction—The Court of Seſſion having found that the irritancy of the co travener's right in the entail of Riccarton did only reſpect the heirs fema and not the heirs male; their judgment is reverſed.

THOMAS Craig late of Riccarton, deceaſed, executed a entail of his eſtate of Riccarton and other lands, which ha been long enjoyed by his anceſtors, in the following manner:- On the 14th of March 1684, he executed a procuratory for re ſigning the ſame to the crown, and afterwards procured a charte under the great ſeal, dated the 29th of January 1686, whereb the ſaid eſtate and lands were granted (*a*) " dilecto nro Thom:

Deſtination. " Craig de Riccarton et hæredibus maſculis ex ejus corpore ltim

Heirs male. " procrean. quibus deficien. Roberto Craig ejus fratri et hæred " bus maſculis ex ejuſd. Roberti corpore ltime procrean. quibu " deficien. Joanni Craig ejus fratri et hæredibus maſculis d " corpore dict. Joannis ltime procrean. quibus deficien. Jacob " Craig ejus fratri et hæredibus maſculis ex ejus corpore ltim " procrean. quibus deficien. Wmo Craig ejus fratri et hæredibu " maſculis ex ejus corpore ltime procrean. quibus deficien. fili:

Heirs female. " legitimæ natu maximæ dict. Thomæ Craig ex ejus corpor " procrean. abſque diviſione, et hæredibus maſculis ex corpor " ejuſd. filiæ procrean. quibus deficien. dict. Thomæ Crai " ejus alteri filiæ ſine diviſione et hæredibus maſculis ex ejuſ " filiæ corpore ltime procrean. et ita deinceps ſucceſſive quat " diu dict. Thomas Craig filias habuerit; quibus oibus deficie " dict. Thomæ Craig ejus propinquioribus ltimis hæredibus " aſſignat. quibuscumque hærie et irredimabiliter cum et ſub pr " viſionibus reſtrictionibus limitationibus et conditionibus ſubt " expreſs. Omnes et ſingulas terras baronias aliaque rexive poſt

Conditions, provisions, &c. " ment. viz. totas et integras terras de Riccarton, &c. Cum " ſub hac tamen proviſione et conditione quod dict. Robert " Joannes Jacobus et Wmus Craigs fratres dict. Thomæ Craig " hæredes maſculi ex eorum Corporibus procrean. nullam poteſt

(*a*) On account of the ſingular importance of this caſe, and as the clauſes of the ch ter are not recited verbatim either in the Appeal Caſes or the Deciſions where it is ported, a copy of the deſtination and clauſes irritant and reſolutive was procured from General Regiſter Houſe, which is here made uſe of.

" tem vel libertatem habebunt debita contrahere vel aliquod aliud " facere in prejudicio hæredum feminarum ex corpore dict. " Thomæ Craig procrean. penes eorum ſucceſſionum ad terras et " ſtatum ſuprament. deficien. hæredibus maſculis dict. Roberti " Joannis Jacobi et Wmi Craigs ltime procrean. Quin etiam " providetur et declaratur qd. oia talia debita et facta contract. " vel fact. per illos nullius erint valoris roboris aut effectus ad " afficiend. dict. Terras et ſtatum aut dict. Thomæ Craig ejus " filias et hæredes feminas quæ eiſdem ſuccedent liberæ et im- " munes ab omni onere quoeunque ſine prejudicio tamen dict. " Roberto Joanni Jacobo et Willielmo Craigs et eorum hæredibus " maſculis antedict. providen. ſuis ſponſis in vitali redditu ad " quartam partem dict. terrarum et ſtatus duran. oibus eorum " vitæ diebus et proviſiones et portiones earum filiabus conceden. " ſi modo dict. proviſiones non excedent trium annorum reddit. " dict. terrarum inter liberos uniuſcujuſque fratris. Provjdetur etiam " et declaratur quod ſi dict. terræ et ſtatus quovis tempore futuro " (deficien. hæredibus maſculis dict. Thomæ Craig et ejus fra- " trum ex corporibus ſuis procrean.) evenerint ad dict. hæredes " feminas tunc et in eo caſu hæres femina natu maxima de tem- " pore in tempus tantum ſuccedet ſine diviſione, et dict. hæres " femina tenebitur et obligabitur nubere viro generoſo cogno- " mine de Craig vel viro generoſo cujuſvis alius cognominis qui " et hæredes ex ejus corpore procrean. omni tempore poſtea " dict. nomen de Craig aſſument et inſignia ſeu arma domus de " Riccarton gerent et utentur. Et ſub hac etiam proviſione quod " minime fuerit in poteſtate dict. hæredum fæminarum vel hære- " dum ex earum corporibus procrean. dilapidare vel alienare dict. " terras et Statum nec debita contrahere vel aliquod aliud facere " quo dict. terræ aut ulla pars earum ab illis evinci poterint, et " ſi contravenire, vel in contrarium facere contigerint eo ipſo " perdent et amittent jus ſuum ad dict. terras et ſtatum pro omni " tempore inde ſequen. et licitum et ltimum erit proximo hæredi " Talliæ actionem declaratoriam deſuper proſequi et immediate " poſtea intrare ad poſſeſſionem dict. terrarum et ſtatus abſque " onere nullius partis dict. debitorum aut factorum. Et ſimiliter " providetur et declaratur quod dict. debita et facta declarabuntur " nullius fore valoris aut efficaciæ ſed vacua et irrita erint quoad " afficiend. et onerand. dict. terras et ſtatum vel proximum " hæredem Talliæ et licitum et ltimum erit proximo hæredi " Talliæ ad eaſdem ſuccedere vel tanquam hæres contravenientis " libero et immuni oneris dict. debitorum et factorum vel tanquam " hæres illius qui obijt ultimo veſtit. et ſaſit. immediate ante " dict. contravenien. et eund. contravenien. præterire cum et " ſub quibuſdam proviſionibus et conditionibus antedict. Tallia " et ſubſtitutio ſupra ſpecificat. eſt fact, et conceſs. per dict. " Thomam Craig in favorem dict. perſonarum tantum et non " aliter. Quæquidem Terræ de Riccarton, &c." Upon this charter infeftment was taken; but the entail was not recorded in terms of the ſubſequent act of parliament 1685.

Thomas

Thomas Craig died without male iſſue, leaving one daughte ſurviving him, who was alive when this appeal was diſcuſſe At the time of his death, he was indebted to the appellants ſ conſiderable ſums of money; and theſe debts to the appellan had been contracted by the ſaid Thomas Craig himſelf, or by hi father or brother (to whom he was ſerved heir) before the makin of the ſaid entail.

After the death of Thomas Craig, his brother Robert wa ſerved and retoured heir of entail and proviſion to him, and ac cordingly poſſeſſed the ſaid lands as heir of entail. Sundry of th creditors of Thomas took new ſecurities from this Robert Craig who alſo contracted large debts of his own, and more than th ſaid eſtate could have ſatisfied; and he thereby became and wa declared a bankrupt. Adjudications of the ſaid lands were alſ obtained by ſeveral creditors of Robert Craig, and of his brothe Thomas, the entailer.

The reſpondents having afterwards brought an action of rank ing and ſale before the Court of Seſſion, the appellants appeare for their intereſt, and pleaded that the creditors of Robert ha no right to be paid out of the eſtate, ſince the deed of entail under which Robert claimed, prohibited him from contracti any debts, and declared that any debts he did contract ſhould b void: The reſpondents inſiſted, that as there was merely a pro hibitory and no irritant and reſolutive clauſe, Robert ſtill had th *dominium* and property of the eſtate, which muſt be liable to hi debts. The Court, on the 25th of July 1711, "found that i "reſpect the entail contained no irritancy of the right of th "contravener, the debts of the ſaid Robert Craig do equall "affect the lands and eſtate of Riccarton, with the debts of hi "predeceſſors, according to their priority of diligence."—And t this interlocutor the Court adhered on the 13th of June 1712.

The appellants having further reclaimed, praying the Court either to find that there was no neceſſity for an expreſs reſolutive clauſe, to make the prohibition upon the heirs male effectual, o to find that the reſolutive clauſe in the entail did affect the whol heirs therein mentioned. The Court on the 22d of July 1712, after anſwers for the reſpondents "adhered to their two former "interlocutors; reſerving to the parties to be heard before the "Lord Ordinary in the cauſe, if the above-mentioned irritant "and reſolutive clauſes in the entail affect the whole heirs." Parties were accordingly heard, and a report being made to the Court, their Lordſhips on the 8th of July 1713, "found that "the irritancy of the contravener's right in the ſaid entail, doth "only reſpect the heirs female, and not the heirs male."

Entered, 12 April 1714.

The appeal was brought from "ſeveral interlocutors orders or "decrees of the Lords of Council and Seſſion of the 25th of "July 1711, the 13th of June and 22d of July 1712, and 8th "of July 1713."

Heads

Heads of the Appellants' Argument.

By the clauſes in the ſaid deed of entail, it was not only provided, by the ſaid Thomas Craig, that the ſaid Robert and his brothers ſhould have no power to contract debts, or do any other thing in prejudice of the heirs female of his body; but it was alſo declared that ſuch debts *ſhould be of no validity to affect his ſaid eſtate.* And the ſaid Robert being ſerved heir of entail and proviſion to his brother Thomas in the very terms of the ſaid ſettlement, his, the ſaid Robert's debts could not affect the ſaid eſtate, or come in competition with the debts due to the appellants, which had been all legally contracted by Thomas Craig the entailer and his predeceſſors, and to which he and the ſaid eſtate were liable before the making of the ſaid entail.

This entail being made before the act of parliament 1685, there was no neceſſity for regiſtering it; and the proviſoes and conditions therein were ſufficiently publiſhed and made known by the ſaid Robert's ſervice and retour as heir of proviſion to the ſaid Thomas, wherein thoſe proviſoes and conditions are expreſsly repeated, as well as in his infeftment following thereon. Theſe being all matters of record, were ſufficient to caution the appellants againſt the ſaid Robert's contracting debts with them.

It is apparent, that it was the ſaid Thomas's intention to prohibit Robert and his other brothers to contract debts, or do acts not only in prejudice of his heirs female, but of one another, *by the exception of a power to make jointures, and provide portions for younger children.* But it does not concern the appellants to diſpute the import of the prohibition, whether it reſpected the other members of the entail, or only the heirs female; for either way it muſt operate in favour of the appellants, who were creditors before the entail; and it being expreſsly declared that Robert's debts ſhall be of no force or validity to affect the ſaid eſtate, of conſequence, in the ranking of creditors upon the eſtate theſe cannot come in competition with the appellants' debts which affected the ſame before the ſaid entail.

It cannot be denied, that Thomas, the maker of this entail, had an unlimited property in his eſtate, and was under no obligation to call his brothers to the ſucceſſion, much leſs to prefer them to his own daughters: but as ſuch abſolute proprietor he had an undoubted privilege of giving laws to his own, and might therefore diſpoſe of his eſtate in ſuch manner and under ſuch proviſoes and conditions, for precluding the ſame from being affected with the debts of his ſucceſſors, as he thought fit. And he has here diſponed the ſame to the ſaid Robert and his other brothers, under the ſaid reſtrictions, whereby Robert after the death of his brother Thomas had only a limited property therein, ſo as that his debts ſhould not affect the ſaid eſtate. The debts owing to the appellants, therefore, which were contracted by the prohibitor himſelf, who was under no reſtriction, were preferable to the reſpondent's debts, which had been contracted by Robert contrary to the ſaid prohibition.

An heir of entail is not bound to the payment or warrandice of all his predeceſſor's debts and deeds: for his predeceſſor being a limited proprietor, and the heir of entail only ſucceeding to him as ſuch, he is only bound to pay and warrant ſuch debts and deeds as do not evict and take away the limited fee.

The interlocutor of the 25th of July 1711, was founded upon a ſeeming inconſiſtency of a perſon's being proprietor, and yet not having the right of alienating or affecting the property, without irritating his own right and fee at the ſame time: but the appellants in a reclaiming petition, ſhewed from the common definition of *Dominium* or property, and ſeveral authorities, that there was no ſuch inconſiſtency; but that a property may be ſo limited that the proprietor cannot alienate, though at the ſame time the contravention may not import an irritancy of the fee. If there be no ſuch inconſiſtency, the clauſe containing the limitation muſt be taken *cum effectu*, and thereby the appellants have an abſolute right of preference.

The appellants in a reclaiming petition, after pronouncing the interlocutor of the 13th of June 1712, contended, that in the limitations of the ſaid charter, there are contained three diſtinct periods. *In the firſt*, beginning at *cum et ſub hac tamen proviſione*, &c. there is a prohibition upon Robert, and the other brothers and the heirs male of their bodies to contract debts, except in favour of their wives and children, with an irritancy of the debts themſelves, declaring, that the debts contracted by them ſhall neither affect the eſtate, nor the heir of entail. *In the ſecond*, beginning at, *Providetur etiam et Declaratur quod ſi dict. terræ*, &c. there is a prohibition upon the heirs female to contract any debt whatſoever, and an injunction to marry one of the name of Craig, or who ſhall aſſume that name, and bear the arms of the houſe of Riccarton, with a reſolutive clauſe, whereby it is provided, that immediately upon the contravention they ſhall loſe their right, and that it ſhall be lawful for the next heir of entail to purſue a declarator, and enter into the poſſeſſion of the eſtate, without any burden of their debts. And then there is a *third period*, beginning at *Et ſimiliter providetur et declaratur*, &c. wherein there is a proviſo relating to both the foregoing periods, and the heirs of entail therein mentioned, that not only all the debts and deeds done by the ſaid heirs of entail, ſhould be of no force or effect to charge the eſtate, but that it ſhould be lawful for the next heir of entail, either to ſucceed to the contravener, free of ſuch debts and deeds, or to paſs him by, and ſucceed to his predeceſſor. And all is concluded with theſe general words, "Cum et ſub quibuſdam proviſionibus "et conditionibus antedict. Tallia et ſubſtitutio ſupra ſpecificat. "eſt fact. et conceſs. per dict. Thomam Craig in favorem dict. "perſonarum tantum et non aliter." It is obvious, that in this laſt period, there is both an expreſſed irritant, and reſolutive clauſe, which is not only applicable, but muſt neceſſarily refer to both the antecedent periods, and by conſequence to the whole heirs of entail therein mentioned. If ſuch an interpretation can be made, it ought to be admitted in this caſe, as moſt agreeable

to

mind and intention of the maker of the entail; which
ly appears to have been to ſecure his eſtate, againſt being
or alienated by any of his heirs of entail, that it might
to all the ſubſtitutes therein free and unincumbered in
hannels through which it was to paſs. To what purpoſe
ſe, was there ſo anxious a prohibition on his brothers to
t debts? and to what purpoſe was a liberty granted them
act debts in one particular caſe? viz. for making proviſion
r wives and children, if his mind and intention had not
bind them up in other caſes. The Court by their in-
or having found, that, in reſpect the entail contained no
f of the right of the contravener, therefore his debts do
ıe eſtate, have in a manner found that without a reſolu-
ıſe, a ſimple prohibition is ineffectual. But there being now
ıl reſolutive clauſe fixed on, ſubjoined to all the prohi-
both upon the ſecond and third claſſes of the heirs of en-
ı clauſe muſt neceſſarily be ſo interpreted as to refer to
ıle, *ut actus valeat*; and this the more plainly appears, if
or of that clauſe be conſidered with the others. The
, therefore, were not only under a ſimple prohibition, but
prohibition with a reſolutive clauſe.

Heads of the Reſpondents' Argument.

eeds of entail are inconſiſtent with the genuine notion of
f, and plainly tend to a perpetuity: upon that account
: to be interpreted moſt ſtrictly, and not to be extended
ıe caſe to another. But in this caſe there is no manner of
on upon Robert and the other heirs which can be of any
he appellants: for the reſtriction upon the heirs male is
y *that they ſhould not contract any debts in prejudice of the*
s heirs female, and in caſe they did, the debts ſhould be void.
grantor's heir female is no party to this action, nor does
ıplain; and conſequently it is *jus tertij* to the appellants
r the heir female be prejudiced or not, and they cannot
ıat the debts are void as to them, for it would be of the
onſequence, if, becauſe there were a prohibitory or other
ı a deed of entail in favour of a particular heir, that therefore
eirs of entail (whom the grantor ſeemed to exclude by not
ng them) or their creditors ſhould be allowed to found upon
vilege merely perſonal in favour of the particular heir.
ıgh that prohibition to contract debts did extend to the
ats as well as the grantor's heirs female, yet it can be of
to them, ſince there is no clauſe irritant or reſolutive of
s right upon contracting of debts: for it is the concurring
of all Scots lawyers, that theſe words are but a ſimple
tion, and of no effect unleſs the ordinary irritant clauſe be
: added, viz. that in caſe the heirs ſhould contract debts,
ebts ſhould not only be void, but the contractor ſhould *eo ipſo*
his right to the eſtate, and the next in remainder enter
ld the eſtate free of all the debts. It is not enough to void

the debts, but likewiſe the eſtate; and unleſs the eſtate is void in that manner, it is impoſſible to prevent the debts from bindi the eſtate, becauſe the perſon ſucceeding muſt ſerve himſelf h to the laſt poſſeſſor; and if he does, he thereby ſubjects himſ and the eſtate to thoſe debts. It was to prevent this that irrita clauſes were firſt invented, and added to the deeds of entail, thoſe who intended to perpetuate their eſtates and families; a without the irritant clauſes, the poſſeſſor continues truly propriet may burthen his eſtate with debts, or ſell the lands for payme of debts. Indeed the act of parliament 1685, which is the fou dation of all theſe deeds of entail mentions only theſe irritant a reſolutive clauſes, as of force to tie up the proprietors from alien tion or contracting debts. The grantor himſelf, too, ſeems have been of this opinion, for, where the eſtate is limited to t heirs female, the debts are not only declared void, but the fee eſtate is voided, and the next in remainder has a power to ent If the grantor, then, had intended to have voided the fee of t heirs male, as well as of the heirs female, it had been eaſy have expreſſed it in both, but his doing it in one, and omitting in the other, plainly ſhews his intention.

There is nothing more evident, than that in this deed, th are two branches of ſubſtitution; firſt the grantor's brothers a the heirs male of their bodies, next the iſſue female, to both which there are diſtinct clauſes ſubjoined; to the firſt, onl ſimple prohibitory clauſe, of not contracting debts; but to t laſt not only a prohibitory clauſe, but irritant and reſoluti clauſes voiding the fee, from a juſt and reaſonable view, that marrying they would be under the influence of their huſban who being of other families, had not the ſame natural ties up them to preſerve the family, as the heirs male were preſumed have. And as this is an ordinary practice in Scotland ſo upon vie of the clauſe itſelf, it is impoſſible ſo far to ſtrain the words as extend the irritant and reſolutive clauſe to the heirs male.

Upon the whole, to reverſe this decree would be a matter the moſt dangerous conſequence, ſince the ſaid Robert Crai according to the undoubted principles of the law of Scotlan was proprietor of the ſaid eſtate, and could ſubject it to his debt Upon the faith of this the reſpondents *bona fide* lent him mone and ſeveral of the creditors of Thomas Craig cancelled the former obligations and took new ones from Robert; and the a pellants were ſo much perſuaded of Robert's right to the ſa eſtate, that they brought actions againſt him for their debts, an obtained adjudications, which was not a regular way if the ſ had been voided. The appellants have adjudications of the ſam date with the reſpondents, and both will be equally paid, no withſtanding of what the petition and appeal untruly ſuggeſts.

Judgment, 3 July 1714. After hearing counſel, *it is ordered and adjudged, that the ſa interlocutory order or decree of the 25th of July* 1711, *whereby t Lords of Seſſion in reſpect the entail contained no irritancy of the rig of the contravener, found,* " *that the debts of the ſaid Robert Cra*

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" do equally affect the lands and eſtate of Riccarton, with the debts " of his predeceſſors, according to their priority of diligence," and the two ſeveral interlocutory orders or decrees of the 13th of June and 22d of July 1712, whereby the Lords of Seſſion adhered to their former interlocutor, be reverſed; and that the ſaid interlocutory order and decree of the 8th of July 1713, whereby the Lords of Seſſion found " that the irritancy of the contravener's right in the ſaid entail, " doth only reſpect the heirs female, and not the heirs male," be alſo reverſed,

For Appellants, *Rob. Raymond. Sam. Mead.*
For Reſpondents, *Tho. Lutwyche. P. King.*

The judgment of the Houſe of Peers in this caſe, is of the higheſt importance, as it reverſes the doctrine laid down by the law writers, on the authority of this caſe at leaſt, viz. That entails being of moſt ſtrict interpretation, a mere prohibition to contract debt, if there be not alſo an irritant and reſolutive clauſe, does not hinder the heir of entail from ſubjecting the eſtate to his debts. In ſupport of this doctrine, the decree of the Court of Seſſion, which *is here ſpecially reverſed*, is founded on in the Dictionary of Deciſions, vol. ii. *voce* Tailzie, p. 432. Bankton, b. 2. tit. 3. ſect. 139. Erſkine, book 3 tit. 8. § 29. Though the decree of the Court of Seſſion was in this caſe reverſed, alſo upon another point, (the conſtruction), it appears from the words of the Judgment, that the doctrine upon the firſt point, (the prohibitory clauſe without an irritant or reſolutive one,) was alſo particularly under conſideration.

It is alſo remarkable on another point, as ſupporting an entail, made prior to the act 1685. c. 22. but not regiſtered in terms of that act. The deciſions upon this point have been fluctuating, but it appears that ſince this judgment, the Houſe of Peers in the caſe, *The Earl and Counteſs of Rothes* v. *Philp*, 16th January 1761, " declared that entails created of Lands in Scotland, with " prohibitive irritant and reſolutive clauſes, before the making of " the act of Parliament 1685, ought to be recorded in the " regiſter of Tailzies, according to the ſaid ſtatute."

Caſe 30. Dalrymple, 9 June 1714.

The Gubernators of Heriot's Hoſpital, and James Young their Treaſurer, - - *Appellant*
Robert Hepburn of Bearford, - - *Reſpondent*

2d, *June* 1715.

Kirk Patrimony.—The ſuperiority of certain church lands, which were p chaſed from the crown for an onerous conſideration, and which were ſpeci excepted in the act 1633, c. 13. "anent regalities of erection," part of general re-annexing acts, found to be in ſuch purchaſers, where the w had taken charters and infeftments from the ſubject ſuperior for near 1 years.

THE lands of the popiſh clergy ſoon after the reformation Scotland fell to the crown, and his then Majeſty King Jam the 6th granted great part of theſe church-lands to certain nobl men and gentlemen, and erected them into temporal lordſhi Sir William Ballindine had a grant from his majeſty of the eſta which had belonged to the abbey of Holy-Rood-Houſe, whi comprehended the barony and regality of Broughton and Canc
1587. c. 29. gate. By the act of parliament 1587, c. 29. the temporalities all benefices and church lands were re-annexed to the crown but with an exception in the following words, "Our Soverei "Lord and the eſtates have declared, and by the tenor here "declare, decern, and ordain that the lands, lordſhips, baroni "under-written, &c. are not nor ſhall not be comprehended "the ſaid annexation, excluding the ſame allutterly therefrae, "remain with the perſons to whom they were firſt diſponed aft "the form and tenor of the infeftments made to them thereof Then follows an enumeration of the exceptions, among which the *barony of Broughton*:

In 1627, Sir William Ballindine, among other lords of erec tion, ſigned the ſubmiſſion to Charles the Firſt, upon which h majeſty's decreet arbitral afterwards proceeded. In the ſame ye 1627, Sir William, for an onerous conſideration ſold and con veyed the ſaid lands to Robert Earl of Roxburgh: And in 163 the Earl, with conſent of Sir William Ballendine, ſold and con veyed the ſame to King Charles the Firſt, for the price of 280,00 merks Scots. This ſum, however, not being paid, the Kin granted to the Earl a wadſet over the lands in ſecurity of the ſai ſum, under the great ſeal, on which the Earl was infeft.

1633, c. 10. & 14. In 1633, ſeveral acts of parliament were paſſed in conſequenc of the King's decreet arbitral. By c. 10. & 14. the ſuperioritie of all church lands are annexed and declared to remain with th crown for ever, and all rights and ſettlements whatſoever mad and granted to any perſon or perſons by his then majeſty or hi predeceſſors, preceding the date of the ſaid acts, are declared voi
c. 13. and null. In c. 13. of theſe acts, which is entitled "*Anent Re* "*galities of Erections*," it is "declared, decerned, and ordaine "that the lands and barony of Broughton," and others "mentione

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the infeftment granted by his majeſty under his highneſs's eat ſeal, to his highneſs's right truſty couſin and counſellor obert Earl of Roxburgh, of the date the day of 30 years, ſhall not be comprehended herein, excluding the ne allutterly therefrom, to remain with the ſaid Earl, his irs and ſucceſſors, after the form and tenor of the infeftnts made to him and his authors of the ſame."

1637, a tranſaction took place between his then majeſty and ppellants; and the king, by a deed, bearing to be with conſ his exchequer, and of Robert Earl of Roxburgh, ſold and moſt ample manner diſponed to the appellants, the ſaid y and regality of Broughton and Canongate, and *in verbo pis*, promiſed to obtain an act of parliament diſſolving theſe from the crown, and declaring that it was the meaning of ng and parliament, that the exception in favour of the Earl oxburgh, contained in the ſaid 13th act was ordained and ind to have been a quality of the ſaid 14th act alſo: and in leration thereof, the appellants paid off the Earl of Roxi's wadſet, amounting to 11,000*l.* ſterling, and further paid m of 3000*l.* ſterling to the crown. In 1641, a *private* act rliament was paſſed declaring "That the lands and barony Broughton ſhall be by no means eſteemed to be compreded within the 14th act of the firſt parliament of King rles the Firſt; but the words, excepting the regality and barony of Broughton, ſhall be eſteemed as inſerted in that th act in the year 1633 above mentioned."

1661, an act of parliament was paſſed, reſcinding all acts 1661, c. 28.
l in the parliament 1641, but it contained a proviſo or decla- in theſe words, "And it is hereby declared, that all acts, hts, and ſecurities paſſed in any of the pretended meetings ve written, or by virtue thereof, in favours of any particular rſons for their civil and private intereſts ſhall ſtand good and lid unto them until the ſame be taken into further conſideration, d determined in this or the next ſeſſion of this parliament."

her act of parliament was paſſed ſame year, ratifying the an- 1661, c. 53.
ion acts of 1633, by which all and whatſoever grants, rights, feftments of the ſaid ſuperiorities made or granted by his then ſty, or his father King Charles the Firſt, at any time ſince ubmiſſion in 1627 are reſcinded and declared void and null, the exception of one infeftment in favours of John Earl, wards Duke of Lauderdale. And this act beſides, holds all tions contained in the acts of 1633, as contained in that act, contains a proviſo or declaration, by which it is always de-d, that "notwithſtanding of this act, any who have gotten ſhall get any new infeftment of ſuperiority of Kirk lands, e ſame ſhall ſtand good as to ſuch vaſſals, who have given eir conſents to the ſaid right of ſuperiority; in regard that ch a conſent as to his majeſty is of the nature of a reſignation their property in favours of the ſaid ſuperior."

he reſpondent was proprietor of the lands of Lochbank, part ne ſaid barony of Broughton, which had been acquired by

the appellants in manner before-mentioned. Theſe lands ha been held by the reſpondents predeceſſors, without challenge, fron the appellants as ſuperiors thereof, and the latter had grante ſundry charters and precepts of Clare Conſtat to the former a their vaſſals, from 1641 downwards. But the reſpondent claim ing to hold his lands of the crown, the appellants brought a action of declarator of non-entry againſt him before the Court o Seſſion; and the reſpondent brought a counter action of declarato againſt them, concluding that his privilege might be declared t hold *in capite* of the crown. Both cauſes being heard before th Court of Seſſion, an interlocutor was pronounced on the 13th o February 1714, by which it was "declared that the reſponden "was acquitted from all claims of ſuperiority for his lands o "Lochbank at the appellants' inſtance; and that the reſpondent "his heirs and ſucceſſors, had the undoubted right and privileg "to enter vaſſals, and hold the fee of thoſe lands of his majeſt "and royal ſucceſſors the immediate lawful ſuperiors thereof." The appellants having reclaimed againſt this interlocutor, th Court, on the 9th of June 1714, "adhered to their former in "terlocutor, and found that the arguments and acts of parlia "ment made uſe of and produced by the appellants did not ex "eem the ſuperiority of the lands in queſtion from the annexa "tion made by the 10th and 14th acts of the parliament 1633 "and therefore decerned in favour of the reſpondent."

Entered 22 June 1714.

The appeal was brought from "an interlocutor or ſentence of th "Lords of Council and Seſſion, dated the 13th day of Februar "1713-14, and the affirmance thereof on the 9th of June 1714."

Heads of the Appellants' Argument.

By the act 1633, c. 14. the ſuperiorities of ſuch church land only were annexed to the crown, the original grants of whicl ſtood merely upon charters from the crown. But the barony o Broughton, which comprehends the ſubject of the preſent debate, was not in that ſituation; for though it had been originally granted by a charter from the crown, yet that grant was not only excepted from the general act of reſumption and annexation paſſed in 1587, but the ſaid grant was confirmed and appointed to remain with the grantees according to the ſaid charter and infeftments. Thus the right ſtood and ſtands on the foot of a public law not repealed expreſsly, nor by any neceſſary conſequence. 2dly. The king having for an onerous or valuable conſideration purchaſed this barony, and not having paid the price, *ſimul et ſemel*, wadſet it for the price; and it cannot be imagined, that the king and parliament meant by the general words of the ſaid act 1633. c. 14. to deprive the Earl of Roxburgh, under whom the appellant claim, of his wadſet. 3dly. This is the more evident, becauſe in the 13th act, paſſed the ſame day in the ſaid parliament 1633 the above reſervation is expreſſed in the moſt ample manner, not with regard to the juriſdiction of regality only, but alſo with re gard to the lands and barony of Broughton, comprehending th milns and others thereto belonging. It were indeed to ſuppoſe, thin

thing againſt all equity and reaſon, that the very next ſubſequent chapter of theſe acts ſhould be deemed to take away the benefit of this exception without an expreſs reſcinding clauſe or reaſon aſſigned; and indeed whoever is acquainted with the hiſtory of theſe acts of parliament, containing reſumption of the temporality of juriſdictions and offices of church lands knows that theſe were not properly diſtinct acts, but ſeveral heads of one great ſettlement, the printing and forming of which were of courſe left to the clerk regiſter, who has made the 14th act the laſt, though by the very tenor of the 13th act it appears, that it was the laſt in order, and the exception was inſerted in that place as an exception from the whole annexation: It, therefore, excepts not ſpecially the juriſdiction of regality which is the ſubject of the act, but the barony and lands, which were no part of the ſubject of it regularly. 4thly. As this muſt be good to defend the wadſet for the ſaid ſum of 11,000*l.* ſterling, ſo it ought to defend the reverſion which was fairly purchaſed for the additional price of 14,000*l.* whereof the 11,000*l.* was paid to the Earl of Roxburgh, and the remaining 3,000*l.* to the crown, for which the hoſpital have not of yearly income above 200*l.* To ſatisfy the niceſt ſcruple, too, it was covenanted on the part of the crown to procure an act of parliament, declaring that it was the meaning of the king and parliament, that the exception in favour of the Earl of Roxburgh, contained in the ſaid 13th act, was ordained and intended to have been a quality of the ſaid 14th act alſo. And accordingly there was an act of parliament paſſed in 1641, in theſe terms, and that not in the terms of a common ratification, but as a private act, confirming the king's deed done with advice of his council in that matter for a very valuable conſideration paid and performed by the hoſpital.

This laſt mentioned act 1641 is not repealed by the reſcinding act 1661, c. 15.; for this reſcinding act contains an exception of all *private* acts paſſed in that parliament, of which nature is the act in favour of the appellants. The reſpondent objected, that this laſt exception was not abſolute, but temporary, till thoſe private acts ſhould be taken into further conſideration in that or the next ſeſſion of parliament; but that the caſe of all the church lands was taken into conſideration in theſe ſeſſions: there never was, however, any act of parliament ſubſequent to the laſt above-mentioned reſcinding act, which in any manner of way had under conſideration any of the church lands, ſo that the 15th act of the parliament 1661 ſtill ſtands good and valid.

It is to be remembered, too, that the king was in poſſeſſion of thoſe lands in fee, upon paſſing the above-mentioned act 1633. But if the reſpondent had any right or title, as he pretends, to the ſuperiority of the above-mentioned lands, he would be debarred by the act of parliament 1617, c. 12., "Anent Preſcription of "Heritable Rights," by which it is enacted, "that whoſoever "his majeſty's leiges, their predeceſſors and authors, have "bruiked or enjoyed heretofore or ſhall happen to brook in time "coming 1617, c. 12.

" coming by themſelves, their tenants, and others having their
" rights, their lands, baronies, annual-rents, and other heritages
" by virtue of their heritable infeftments made to them by his
" majeſty, or others their ſuperiors and authors, for the ſpace of
" 40 years, &c. that ſuch perſons, their heirs, and ſucceſſors
" ſhall never be troubled, purſued, or inquieted in the heritable
" right and property of their ſaids lands and heritages foreſaids by
" his majeſty, or others their ſuperiors and authors, their heirs
" and ſucceſſors, nor by any other perſon pretending right to the
" ſame by virtue of prior infeſtments, public or private, nor upon
" no other ground, reaſon, or argument, competent of law, ex-
" cept for falſehood."

Beſides the reſpondent and his predeceſſors, in virtue of the the clauſe of the before-mentioned act 1661, c. 53. are debarred from holding of the crown, for his predeceſſors have for almoſt 100 years " given conſent to the ſaid right of ſuperiority," and taken their charters from the hoſpital accordingly.

Heads of the Reſpondent's Argument.

The acts or ſtatutes of annexation are general, and comprehend all ſuperiorities of church lands whatſoever, and make no diſtinction whether the grant had been for an onerous conſideration or not, and whether before or after the annexation. Particularly the before recited act 1661, c. 53. does reſcind all grants made by King Charles the Firſt, except that in favour of the Duke of Lauderdale, which confirms the rule and law as to all other grants not excepted. Though the grant made to the Earl of Roxburgh, and by him to the appellants, might have been for onerous conſiderations; yet the firſt grant was in favour of Ballindine of Broughton, and it does not appear that his grant was for any onerous conſideration, and he is one of thoſe who ſubſcribed the ſubmiſſion to the king in 1627, upon which the acts of annexation followed.

With regard to the act 1633, c. 13. relied on by the appellants, there is a great diſtinction between a regality and a ſuperiority. Several of the church lands having been erected into regalities in favour of the biſhops and abbots, whereby they had a power over their tenants and vaſſals in civil and criminal matters; theſe were alſo annexed to the crown, with the exception in favour of the Earl of Roxburgh, ſo that the vaſſals of that regality remained ſubject to the earl's juriſdiction or power. But this is different from the ſuperiority; a convincing proof of which is, that the very next act, c. 14. annexes the *ſuperiority* of all church lands to the crown, without any exception in favour of the Earl of Roxburgh: and the act 1667, c. 53. reſcinds all grants made by King Charles the Firſt, except that in favour of the Duke of Lauderdale. But what fully anſwers the appellants' argument on this head is, that when the Earl of Roxburgh in 1637 ſold the lands of Broughton, with conſent of the king, to the appellants, his majeſty promiſes in the next parliament to procure theſe lands diſſolved

diſſolved from the crown, ſo that if they had not been annexed, there was no occaſion for ſuch an act.

But this was never done, nothing was obtained in the parliament 1641, but a ſimple ratification paſſing in courſe on the laſt day of the parliament, among 300 more, of which this is the 135th: they were never printed among the other acts of parliament, but paſſed of courſe, and might be obtained by any perſon who demanded them; and they can never prejudge the intereſt of a third perſon having a prior right, which is the caſe of the reſpondent. His right is preſerved by the act *Salvo jure cujuſlibet*, which is always the laſt act of every parliament. But diſſolutions of ſuperiorities that had been annexed to the crown muſt be by ſuch public acts of parliament as paſs with all the deliberation and ſolemnities of the acts of annexation, and have the royal aſſent, which is not pretended to have been the caſe with the act 1641.

With regard to that part of the act 1661, c. 53, founded on by the appellants, There being a publick law annexing theſe ſuperiorities to the Crown, no deed of the vaſſals could without conſent of the Crown deprive it of that ſuperiority, but according to the tenor of the exception contained in this laſt-mentioned act, which is an expreſs conſent by ſome writing from the vaſſal. This is clear by the words of the ſtatute, viz. "In re-"gard ſuch a conſent, as to his majeſty, is of the nature of a "reſignation," or giving over the lands to the ſuperior to be holden of the king. So, this conſent was to be by ſuch an expreſs and poſitive deed in writing, as was equivalent to the vaſſals ſurrendering to the king; and the ſame vaſſal continuing only to take charters, or new titles, from thoſe who had been lords of erection, was but a temporary expedient, and a conſent by implication, and not equivalent to a reſignation in the Crown's hands required by the ſtatute.

Nor can the act 1617, c. 12, with regard to preſcription take place here, for the appellants' contract in 1637 was entirely cut off as to the right of ſuperiority, by the act 1661, c. 53, and ſo was no title of preſcription unleſs it had been renewed after the ſaid act. The poſſeſſion for forty years, by the law of Scotland, gives no right, where the perſon claiming it has no title, and when the defender has it in his choice to act and do this or that way, (which by the doctors of the civil law is called *actus meræ facultatis*,) except he had given a poſitive writing binding him to it. This is confirmed by all the eminent Scots Lawyers who write on this ſubject, and is the conſtant practice of the Lords of Seſſion in the like caſes. Nor is it to be doubted but that the crown in this caſe can oblige the reſpondent to take his charters or titles, immediately from it as vaſſal to the crown, becauſe no deed done by the vaſſal can prejudge the ſovereign without his own conſent.

After hearing counſel, *It is ordered and adjudged that the ſaid interlocutor or ſentence, and the affirmance thereof complained of in the ſaid appeal, be reverſed; and it is ordered and declared, that the ſupe-*

Judgment, 2 June 1715.

ſuperiority of the lands in queſtion, called Lochbank, lying within the barony of Broughton, ſhall belong to the appellants.

For Appellants, *David Dalrymple. Sam. Mead.*
For Reſpondent, *Edward Northey. Spencer Cowper.*

The judgment here reverſed is founded on in the Dictionary voce *Kirk Patrimony*, vol. 1. p. 531.

Caſe 31. The Corporation of Butchers in Edinburgh, *Appellants*;
The Magiſtrates of Edinburgh, and Corporation of Candlemakers there, - - *Reſpondents.*

29th *June* 1715.

Burgh Royal.—The Court of Seſſion having found that the butchers of Edinburgh ſhould be reſtrained from rinding tallow for ſale, and that the magiſtrates could oblige them to ſell their tallow at a certain price to the candlemakers, which was in terms of a bye-law of the magiſtrates, ratified by a private act of parliament, the judgment is reverſed.

Act of parliament: 1540, *c.* 123.—This act was not ſufficient to reſtrain the butchers from melting or rinding their tallow.

1424, c. 32. BY an act of parliament 1424, c. 32. it is enacted, "that na "Taulch be had out of the realme, under the paine of ta-
1540, c. 123. "cheitte of it to the king." By another act of parliament 1540 c. 123. it is enacted, "that na maner of man, fleſchour nor "others, to burgh nor to land, take upon hand to rinde, melt, "nor barrel tallun, under the paine of tinſel of all their gudes."

The magiſtrates of Edinburgh, by a regulation or bye-law, dated the 15th of September 1517, diſcharged all the inhabitants of the burgh, other than the candle-makers from melting tallow or making candles, except for their own uſe and to burn in their own families. By another regulation or bye-law, dated the 10th of October 1551, the magiſtrates ordained, that no butcher or other perſon within the ſaid burgh, ſhould ſell any tallow to ſtrangers or inhabitants of other towns, but to the neighbours and candlemakers thereof; and that no freeman, other than the candlemakers, by themſelves or ſervants, ſhould melt any tallow for making of candles, beyond what they made for their own uſe, under the pain of eſcheat thereof, payment of 5*l.* to the common works, and *baniſhing the town.* King James the 6th, on the 4th of May 1597, by a ratification of privy council, and a grant under the great ſeal, not only ratified the ſaid acts and ordinances of the magiſtrates, but all ſuch further rules and conſtitutions as ſhould be thereafter made in favour of the candle-makers.

By another regulation or bye-law, dated the 27th of September 1693, the magiſtrates ordained, "that the price of rough tallow "ſhould not exceed 48 ſhillings Scots per ſtone, and that the "price of candles ſhould be 58 ſhillings Scots per ſtone; and "that

that the butchers of Edinburgh, and others, ſhould ſell all their tallow to the candle-makers, and to no one elſe till they were ſerved, on pain of forfeiting their goods, and ſuch further penalties as the ſaid magiſtrates ſhould think fit to inflict: And that for the future, all the country butchers bringing meat to Edinburgh on the market days, ſhould be obliged to bring in their rough tallow to be ſold on the ſaid market days to the ſaid candle-makers and burgeſſes, and to no others till they were ſerved, under the ſaid penalties." The magiſtrates alſo revived former bye-law, bearing date the 17th of October 1684, im-poſing a fine of 20 ſhillings upon the tranſgreſſors. And all theſe regulations and bye-laws, with the ratification under the great ſeal before-mentioned, were ratified and confirmed by a private act of parliament on the 17th of July 1695; but this (the appellants ſtate) the magiſtrates and candle-makers did not, till very lately, put in execution.

The appellants, however, refuſing to ſell their tallow to the reſpondents the candle-makers, at the rates mentioned in the fore-ſaid bye-law, the magiſtrates, in June 1714, ordained a fine of 10 ſhillings ſterling, to be levied upon all perſons refuſing to obey the ſame. The appellants, thereupon, commenced an action of reduction and declarator before the Court of Seſſion, againſt the reſpondents, concluding, that the acts and regulations before-mentioned, and all other acts, bye-laws, and ordinances whereby any reſtraint was laid upon them as to the price and manner of diſpoſing of their tallow ſhould be reduced and made void; and that it might be found and declared, that they had right to ſell their tallow rough or rinded to any perſons whatſoever, without diſtinction; and to rind and export the ſame to England, or elſewhere as they ſhould think fit. The reſpondents brought a counter action of declarator againſt the appellants, to have it decerned and declared, that the appellants had no right, and ought to be diſcharged to melt down any tallow, or ſell the ſame to any other perſon, till ſuch time as the reſpondents and other free burgeſſes and inhabitants of the burgh ſhould be ſerved; and that the appellants ought to ſell their tallow at the rates and prices ſet thereupon by the magiſtrates, according to the laws and ordinances made by them. Both theſe actions being heard, the court, on the 15th of February 1715, "found that the appellants ought to be reſtrained from rinding of tallow for ſale, and alſo found that the magiſtrates and council of Edinburgh could oblige the appellants to ſell their tallow to the candle-makers, at a price to be put thereupon by the magiſtrates and town-council." The appeal was brought from "an interlocutor, ſentence, or decree of the Lords of Council and Seſſion, made the 15th of February 1715." Entered, 11 May, 1715.

Heads of the Argument of the Appellants.

The old laws with reſpect to the reſtraint of expoſing the native produce of the kingdom are much altered by the increaſe of trade, having ſince learned by experience that any ſmall inconvenience

nience particular perſons might ſuffer by paying a little more for the home product, is much more than compenſated by the advantage which the nation in general, and the crown, reap by the exportation of ſuch commodities into foreign parts. Although by ſeveral old laws fiſh was prohibited to be exported, yet in after times fiſh was not only allowed to be exported, but a premium given for the export thereof both before and ſince the union. And this is the very caſe, as to the old laws prohibiting the exportation of tallow, which by degrees became obſolete and in deſuetude, tallow being now a *ſtaple commodity*, and ſince the union expreſsly allowed to be exported. The act againſt the melting, rinding, and barrelling of tallow, was only to prevent the exportation; and when that act was in force it extended generally to all men, butchers and others, and ſo comprehended even the candle-makers themſelves, and all perſons making candles for their own uſe; which plainly infers, that it muſt be meant only of melting, &c. in order to export it, and ſo falls in conſequence with the prohibition of exporting it.

The ſeveral acts, ordinances, or bye-laws of the magiſtrates and town-council, and particularly that in 1693, whereby any reſtraint was laid upon the appellants as to the price and manner of their diſpoſing of their tallow, ought to be reſcinded and declared void and null in themſelves, for the ſeveral reaſons following, viz.

1. For that the laying ſuch a reſtraint was againſt the common right of the ſubject, both buyer and ſeller, deſtructive to trade, and an unwarrantable and unprecedented impoſition, not only upon the appellants, but upon other free ſubjects who muſt be furniſhed in publick markets, and cannot otherwiſe have an opportunity of buying tallow for their reſpective uſes: And if this bye-law ſhould be binding, it would be a precedent to the magiſtrates of other burghs to make the like regulations, which would be a manifeſt grievance to all ſuch ſubjects as are not free of thoſe burghs.

2. For that the giving the candle-makers ſuch a right of preemption, tended manifeſtly to a monopoly, and gave them power to impoſe upon their fellow ſubjects ſuch rates for their tallow as they thought fit.

3. For that the ſaid act or bye-law of the magiſtrates in 1693, was not only contradictory to their former bye-law in 1551, which allows the ſale of tallow to all the *neighbours* of the burgh, without any reſtriction to burgeſſes only, but is wholly partial in favour of the reſpondents, the candle-makers and themſelves, by excluding their neighbours of the former benefit of buying tallow for their own uſe within the ſaid burgh, as before they might.

4. For that the ſaid bye-law is incoherent and impracticable in itſelf; for how can the appellants know when the candle-makers and other burgeſſes are all ſerved; or how is it poſſible to diſtinguiſh between a burgeſs, and an inhabitant that is not a burgeſs.

5. For that ſuch an ordinance or bye-law is manifeſtly inconſiſtent even with the Britiſh acts ſince the union, which allow all ſubjects in general to make candles for their own uſe, paying the duty impoſed thereon. And if this bye-law ſhould take place, this privilege of making their own candles would, in many reſpects, be rendered ineffectual to all ſuch perſons as are not burgeſſes, or at leaſt they would be under ſuch inequalities and inconveniences as the law has no where laid upon them.

6. For that theſe bye-laws are unequal and unjuſt, ſince there is no obligation laid upon the reſpondents, to take all the appellants' tallow off their hands at the rate therein preſcribed, whereby the appellants (if this bye-law ſhall be allowed valid) will be put under this inſuperable diſadvantage, that when they have kept their tallow till the candle-makers and burgeſſes are ſerved, it is ſtill optional to them to buy or not, as they think fit. And indeed, if they can have their tallow from the country, as it is well known they may, they will not, and need not, buy it from the appellants, but the appellants' tallow muſt be upon their hands till it be uſeleſs, if they cannot export it as other ſubjects do, or otherwiſe they will be obliged to ſell it at ſuch a price as the reſpondents will pleaſe to give for the ſame; and more eſpecially if they ſhould be reſtrained from rinding it, without which it will putrify, and be of no uſe in leſs than two days.

For that the magiſtrates, as they have not a power to reſtrain the appellants from ſelling their tallow to any perſon that wanted the ſame, ſo they have no authority to ſet a price thereon by any bye-law. For although the magiſtrates may ſet prices upon victuals, as bread, ale, &c. with which the inhabitants muſt neceſſarily be furniſhed within the burgh, yet they have no power to ſet prices upon any original commodity, as tallow, no more than upon wheat, barley, hides, wool, &c. and the acts of parliament, whereon they found their pretended authority, relate only to victuals, or ſuch other things as are therein expreſsly named: and the giving ſuch a power to magiſtrates of burghs, to ſet prices upon tallow, hides, and other original commodities, would prejudice the gentlemen of landed property, ſince it might in a great meaſure tend to leſſen the value of their eſtates.

As to the act of parliament in 1695, whereby the bye-law of 1693 was ratified, ſuch acts of ratification are paſſed of courſe, (as this was without calling the appellants) and by the laws of Scotland have never been reckoned of any importance, for, if the ordinances or bye-laws which are ſo ratified be void in themſelves, the ratification will give no ſanction thereunto; and the cuſtom of Scotland provides againſt ſuch ratifications, where parties are neither heard nor called by an act deſignedly made at the end of every ſeſſion of parliament, the *act Salvo jure Cujuſlibet.* The laſt part of this very bye-law, whereby the country butchers who brought meat on the market days, were enjoined to bring in their rough tallow to be ſold on the ſaid market-days to the candle-makers and burgeſſes, was in 1698, notwithſtanding ſuch ratification, reſcinded by the privy council, and declared to be an abuſe;

and

and the appellants have reaſon to believe that if they had complained at that time, the ſaid bye-law, as to them, would have met the ſame fate.

The reſpondents objected, that they were bound by their oaths to obey the ordinances of the magiſtrates, but the appellants are not bound by their oaths to obſerve any ordinances which are illegal and unjuſt in themſelves. The reſpondents objected likewiſe, that the appellants would raiſe the price of candles in caſe theſe ordinances were not obſerved by them; but this was ſtarted only to incline the members of the College of Juſtice to favour the reſpondents. For although the appellants ſhould demand exorbitant prices, the candle-makers would be under no neceſſity of buying from them, but could, and no doubt would, furniſh themſelves from other places, as every perſon knows they might: *And thus, it would be in the power of the candle-makers to ruin the butchers at pleaſure.*

Heads of the Reſpondents' Argument.

The ſtatute 1540, c. 123. whereby the appellants are expreſsly forbid to melt tallow, is not in deſuetude, and there have been continued prohibitions with regard to the appellants' ſelling tallow till the reſpondents and other burgeſſes be firſt ſerved, neither are theſe prohibitions inconſiſtent with the privileges of the ſtaple, becauſe the appellants were to furniſh the reſpondents with their tallow for the uſe of the inhabitants, and the ſurpluſage might be exported. Nor does the treaty of Union unhinge the privileges of burghs, or make void their regulations upon their leſſer incorporations, which are for the good and ſervice of the inhabitants and other lieges; and the general freedom of trading agreed to by the Union was never meant to lay open, deſtroy, or overturn the laws, ordinances, or conſtitutions of the burghs.

All burghs by their charters of conſtitution have power of making by-laws or ordinances amongſt the leſſer corporations, as may be for the benefit and advantage of the whole, by regulating the ſubject of trade belonging to each corporation, viewing the markets and ordering the prices of *vivers*: and the obſerving and exerciſing that power is recommended to the magiſtrates of every burgh by ſeveral ſtatutes ordaining them to ſet reaſonable prices upon wine, ſalt, timber, &c. In purſuance of theſe laws the magiſtrates of Edinburgh have been in the conſtant practice of regulating the prices of ſuch things within the city as they judged neceſſary for the common good, and particularly that of tallow, which has been ratified and confirmed by King James the Sixth in 1597, and by King William in 1695. Neither is the trading in tallow properly the appellants' employment; the reſpondents, the candle-makers, being a corporation ſpecially conſtituted for that effect; and as the ſubject of their trade within burgh comes from the hands of the appellants, it is moſt juſt and reaſonable, that that ſubject ſhould be regulated by the magiſtrates, leſt it ſhould be in the power of one incorporation entirely to diſappoint the trade of another, to the great prejudice of the lieges; and

1540, c. 100.
1551, c. 23.
1555, c. 57.

the magiſtrates have always been ſo careful of the appellants, that they annually rate the tallow higher or lower according to the prices of cattle, of which they are fully appriſed before they make any ordinance concerning the ſame.

That which has been the practice of the appellants for near 200 years, as appears by the ordinances of the city council, is ſtill practicable; and all that is required by theſe by-laws, is, that the appellants be obliged to ſell their tallow to the reſpondents when they demand the ſame at the rates fixed by the city laws, by which the price of candles is alſo to be regulated. As to the inhabitants, not free-men burgeſſes, they were never reſtrained from buying, only that it ſhould not be pretended and uſed by the appellants as a handle to alter the privileges of the reſpondents. 15 Sept. 1517. 10 Oct. 1551.

The diſtinction which the appellants contended for, between raw and manufactured articles, is contrary to the ſtatutes empowering the magiſtrates of every burgh to ſet a price upon timber, which is not ſuppoſed to be manufactured; and if the magiſtrates have a power of rating candles, (which is not denied,) the ſame reaſon will hold as to tallow, becauſe the regulation upon candles follows in proportion with the regulation upon the tallow; and if the price of tallow be not regulated, neither ought the price of candles, by which the city will ſuffer a conſiderable prejudice. 1540, c. 100. 1555, c. 57.

After hearing counſel, *It is ordered and adjudged, that the interlocutory ſentence or decree in the appeal complained of, whereby the Lords of Seſſion found,* "*that the appellants ought to be reſtrained* "*from rinding of tallow for ſale,*" *and alſo found,* "*that the magi-* "*ſtrates and council of Edinburgh can oblige the appellants to ſell their* "*tallow to the candle-makers for making of candles to be conſumed in* "*the town at a price put thereupon by the magiſtrates and town* "*council,*" *be reverſed.* Judgment, 29 June 1715.

For Appellants, *Spencer Cowper. Rob. Raymond.*
For Reſpondent, *J. Jekyl. W. Lechmere.*

Caſe 32. Fountainhall 27 Dec. 1711. Forbes, 13 Feb. 1713.

William Collier, Captain of his Majeſty's Ship the Mermaid, - - - *Appellant*;

Robert Stewart, Provoſt of Aberdeen, and Company, Owners and Freighters, and Alexander Inglis, Maſter of the Ship Joanna of Aberdeen, - - - *Reſpondents.*

8th *July* 1715.

Prize.—A French privateer having captured a Scots ſhip, took a quantity of goods out of her, and ſome money from the ſhip-maſter, and upon payment of a ranſom agreed upon, allowed the ſhip to depart with a ranſom brief; the privateer having continued upon the coaſt, and being there captured by a Britiſh ſhip of war the money and goods taken by force, as well as the ranſom, were to be reſtored by the captors.

THE ſhip Joanna of Aberdeen, was upon the 17th of May 1711, in her voyage to Virginia, captured off the Orkney Iſlands, by the Pontchartrain a French Privateer; and upon the capture, four bales and two caſks of goods, parcel of the cargo, were taken out of the prize, and alſo 26 guineas out of the pocket of the reſpondent Inglis the Maſter.

The Pontchartrain with her prize brought up before Aberdeen, and a ranſom of 200 guineas and 5*l.* being agreed upon, the ſame was paid by the reſpondents to the Captors upon the 22d of May. The Pontchartrain thereupon delivered to the Joanna a ranſom-brief for her protection, and ſhe proceeded on her voyage.

Upon the 28th of the ſame month of May, the privateer was taken upon the Scotch coaſt by the appellant, and in it were found the ſaid four bales, and two caſks of goods taken out of the Joanna, and money to the amount of the 26 guineas taken from the reſpondent Inglis, with the 200 guineas and 5*l.* paid for ranſom.

The appellant having brought the privateer to Leith, it was, on the 12th day of June thereafter, adjudged and condemned as lawful prize by the Court of Admiralty there. The prize, with the goods on board, and money, were delivered to an agent for prizes, choſen as directed by the act 6 Ann. c. 13. intituled, "an "act for the better ſecurity of the trade of this kingdom, by "cruizers and convoys," and for the ends and purpoſes recited in the ſaid act. The bales and caſks of goods being put on board the ſhip Greyhound, by the agent, in order to a ſale, the Greyhound with theſe goods, was caſt away, and theſe goods were loſt.

The Mermaid being in the Frith of Forth, and the appellant at Leith, the reſpondents brought an action againſt him before the Court of Admiralty in Scotland, for recovering the ſaid 26 guineas and parcels of goods, and the ſaid 200 guineas and 5*l.* ranſom money, upon the ground, that ſince the privateer ſtil

continue

continued upon the coaſt of Scotland, and had not carried the goods and effects of the reſpondents *infra præſidia hoſtium* the property of the ſame was not veſted in the privateer, but continued with the reſpondents, in the ſame manner as the ſhip would have done if not ranſomed; and this the rather, as the capture of a privateer was by a Britiſh ſhip ſent purpoſely to cruize upon the coaſt for the protection of trade. The appellant did not make appearance to this action, and decree in abſence paſſed againſt him on the 25th day of Auguſt thereafter.

In January 1712, the appellant brought a bill of ſuſpenſion before the Court of Seſſion, of the ſaid decree of the Court of Admiralty, in regard that the ſame was pronounced while he was *abſens reipublicæ cauſa*. The Court reponed the appellant againſt the ſaid decree, and turned the ſame into a libel; and after various proceedings, the Court, on the 13th of February 1713, "Found that the property of the money and goods which were "taken from the reſpondents by the ſaid privateer, and not con- "tained in the ranſom bill, remained ſtill with the reſpondents, "and therefore, that the privateer having continued upon the "coaſt of the kingdom, and being taken there by the appellant "as commander of one of her majeſty's ſhips of war, within the "bounds of his cruize, he ought to reſtore ſuch money and "goods to the reſpondents, and declared they would adviſe the "debate as to the contents of the ranſom bill on Wedneſday "(then) next." Accordingly, on the 16th of February thereafter, the Court "Found that the 200 guineas and 5*l*, remained "ſtill to the reſpondents, and repelled the allegation that the "ranſom was *bona fide* received by the agent, in reſpect of the "citation before the Admiral prior to the receipt, and remitted "to the Lord Ordinary to hear parties on the import of the other "receipt granted to the ſaid agent prior to the citation before the "admiral."

The appeal was brought from "two interlocutory decrees or "ſentences of the Lords of Seſſion of the 13th of February "1713, and 16th of February 1714 (*a*)" Entered 6 May, 1715.

Heads of the Argument of the Appellant.

The contract between the ranſomers and the French was free, voluntary, mutual, and abſolute; they re-delivering the ſhip, and the ranſomer paying the 200 guineas and 5*l*. The ranſom was a fair tranſaction according to the laws of war, whereby the ſhip Joanna purchaſed her freedom, and obtained a ranſom-brief for protection from other privateers during the voyage; and the privateer having got the ranſom money, *ex contractu*, the ſame muſt be conſidered as purchaſe money, and the property belongs to the privateer, and is tranſmitted to the appellant, and returns not to the firſt owner.

By the ranſom-brief the ſhip and goods were protected againſt all other French ſhips, during her intended voyage, had ſhe met

(*a*) It appears from the Caſes that this is a miſtake for 1713.

with ever ſo many before ſhe had fully completed the ſame: And it is not reaſonable, that the reſpondents, whoſe ſhip has finiſhed her voyage and unladed her cargo ſafely in port, ſhould now reclaim the ranſom-money, on pretence that the privateer was chaſed and taken before ſhe could get home to her own port, with the ranſom money given for ſuch protection.

As to the 200 guineas and 5*l.* *non conſtat* whether it was the ſame identical money ſo paid by the ranſomers, for there paſſed ſix days from ſuch payment, before the privateer was taken by the appellant; and the privateer in that time might have ſent home the ſpecies of money received for ranſom, or otherwiſe alienated and diſpoſed of the ſame, and other like ſpecies of money might have been on board.

Admitting that there ſhould be a difference between the ſpecific 26 guineas, and the 4 bales and 2 caſks of goods, and the ranſom price the 200 guineas and 5*l.*, which the appellant contends there is not; yet the 26 guineas and goods were taken by force, and therefore, though the reſpondents ſhould inſiſt upon a reſtitution for them, yet the ranſom-money was voluntarily given, and the ſhip redelivered for the common benefit of both parties, which gives a full and irrevocable property as to it.

And further the ſaid 26 guineas, and the goods were taken before the ranſom was agreed to, and muſt be preſumed to have been thrown into the ranſom, and quitted and given up accordingly, by the maſter's ſubſequent acceptance of the ranſom-brief for his whole ſhip and cargo, and acquieſcence therein.

Heads of the Reſpondents' Argument.

By the common and univerſal opinion of the beſt lawyers of all nations, the goods and effects taken on board any ſhip by an enemy, do not become the enemy's property unleſs they be carried *infra præſidia hoſtium.* Grotius's words are very expreſs, "Hæ "vero res, quæ infra præſidia perductæ nondum ſunt, quanquam "ab hoſtibus occupatæ, ideo poſtliminii non egent, quia Domi-"nium nondum mutârunt ex gentium jure." And ſo are the opinions of other authors who write upon that ſubject. Till the effects are brought *infra præſidia hoſtium*, there are hopes of recovery of theſe goods from the enemy by the ſubjects or allies of the ſtate from which they were taken.

This doctrine applies alſo to the 26 guineas taken out of the reſpondent Inglis's pocket, and to the four bales and two caſks of goods which had been taken *vi majore* before the ranſom was agreed upon, and which form no part of the ranſom-bill. But, further, even the 200 guineas and 5*l.* for the ranſom muſt be accounted for to the reſpondents, ſince the property was not changed; for, ſuppoſing no ranſom had been given, but that the ſhip and goods had continued in the poſſeſſion of the privateer, there is no queſtion, but they would have been reſtored upon the re-capture, and ſo ought the ranſom which came in place of thoſe. Or, ſuppoſing that the ranſom-money had not been paid, but that the maſter of the ſhip had been detained as an hoſtage till the ranſom money

money had been paid, there is no queſtion but upon the re-capture the hoſtage would have been releaſed, and the re-captor would have had no pretence to the ranſom-money for which the hoſtage was kept. Indeed all agreements of this kind are involuntary, and are only gone into to prevent a greater evil, and therefore tacitly include the hope of a recovery by a ſubſequent capture of the enemy.

With regard to the identity of the money, the ſhip was taken the 17th of May, and brought up before Aberdeen to receive the ranſom-money on the 22d, and upon the 28th ſhe was taken by the appellant, a plain evidence that the ſame money was ſtill there, ſince the privateer had been all that time upon the coaſt: And as it is not pretended, but the goods were on board the privateer at the re-capture, ſo the very ſum of 226 guineas was found on board the ſaid privateer, and no more gold, as appeared by the receipt of the agent, to whom the appellant delivered the ſame.

The appellant founded upon the act of parliament 6 Ann. c. 13. by which it is enacted, that if any privateer ſhall be taken as a prize by any of her majeſty's ſhips of war, and adjudged as prize in any of her majeſty's Courts of Admiralty, the commander, officers, and ſeamen who ſhall be on board ſuch ſhips of war, ſhall, after ſuch condemnation, have the ſole intereſt and property in ſuch prize ſo taken and adjudged to their own uſe, without further account to be given for the ſame. But this act only gave the officers and ſeamen the ſhares of prizes formerly belonging to the crown or admiral; but it does not concern the ſhips or goods belonging to Britiſh ſubjects or their allies retaken from the enemy, and therefore does not affect this caſe, the law being left as formerly. And if the appellant have paid the money, and delivered the goods belonging to the Britiſh ſubjects to the agent, he muſt blame himſelf, ſince the reſpondents commenced an action againſt him for recovery of the effects in queſtion, before they were delivered to the ſaid agent, as appeared by his receipt. 6 Ann. c. 13.

After hearing counſel, *It is ordered and adjudged, that the ſaid petition and appeal be diſmiſſed, and that the interlocutory decrees or ſentences therein complained of be affirmed.* Judgment, 8 July 1715.

For Appellant, *Nath. Lloyd.*
For Reſpondents, *Edw. Northey. Will. Hamilton.*

Caſe 33. James Watſon of Saughton Eſq; - - *Appellan*
Robert Watſon of Muirhouſe Eſq; - - *Reſpond*

13th *July* 1715.

Tutor and Pupil.—Acceptance of the office of tutory found not proved b
torial inventories, which were not judicially ſigned, and wanted wi
name and witneſſes, unleſs poſterior acts of adminiſtration were inſtru
nor by a miſſive letter not holograph, and without ſolemnities, conſe
to lend the pupil's money.

Certain acts of adminiſtration not ſufficient to infer the acceptance o
office.

An affirmance with 30*l.* coſts.

JAMES Watſon of Saughton, the appellant's father, by his will and teſtament bearing date the 6th of March 1703, pointed the appellant his executor, and nominated Sir Ja Foulis, Sir Alexander Dalmahoy, Robert Watſon of Muirho the reſpondent's father, John Watſon, the teſtator's brother, William Watſon, writer in Edinburgh, his couſin, to be tu and curators to the appellant during his nonage, the ſaid Will Watſon being always *ſine quo non*; and he is alſo appointed by teſtator to be manager and receiver of the whole eſtate, real perſonal, that ſhould belong to the appellant as heir or execu to the teſtator, with an allowance of 50*l.* of yearly ſalary, beſi his charges; and he is ordained to make up his accounts yea at leaſt once in two years, at the ſight of the other tutors, J Watſon, the teſtator's brother, being always one: The will furt "declares, that none of the tutors and curators accepting "office, ſhall be accountable or liable for any omiſſion, but c "for their actual intromiſſions." A few days after executing t will the appellant's father died.

After his death, the ſeveral perſons appointed by him, cau an inventory of all his real and perſonal eſtate to be made; a on the 27th of Auguſt 1703, three duplicates of this invent were ſubſcribed by them, and by three other perſons who w neareſt of kin to the appellant. Theſe duplicates were exhibi by a procurator before the ſheriff of Edinburgh, who, toget with his clerk, ſigned the ſame. None of theſe duplicates l the writer's name inſerted in them, nor were there any ſubſcrib witneſſes to them. The reſpondent's father died before the a pellant had attained the age of 14 years; and about a year aft wards William Watſon, the tutor *ſine quo non*, died alſo.

After the appellant arrived at 21 years of age, he brought action before the Court of Seſſion againſt his ſurviving tutors a curators, and againſt the reſpondent as heir to his father, c cluding that they ſhould conjunctly and ſeverally be decreed to accountable in ſolidum to the appellant for the whole rents a profits of his lands, and all goods and effects received by th contained in the aforeſaid inventory; and he alſo inſiſted, t thou

though the teſtator by his will had declared that no tutor or curator accepting the office ſhould be accountable for omiſſions, but for actual intromiſſions only, agreeably to the act of parliament 1696. c. 8. empowering fathers to name tutors and curators with that quality; yet that ſuch power was only given to fathers in *Leige Pouſtie*, whereas the appellant's father was on his death-bed when the will was executed. 1696, c. 8.

To prove the reſpondent's father's acceptance of the office, and intromiſſions with the appellant's eſtate, the latter produced one of the duplicates of the inventory before mentioned; and alſo two miſſive letters written upon one paper, directed to the ſaid William Watſon, wherein Sir James Foulis, one of the tutors, adviſes him that he was to pay ſome money he owed the appellant, and gives it as his opinion that the ſame ſhould be lent to Mr. Foulis of Ratho; the other from Sir Alexander Dalmahoy, giving alſo his opinion that the pupil's money could not be better ſecured, to which laſt letter theſe words, "*Robert Watſon conſents*," are ſubjoined.

The reſpondent anſwered, that though his father had been appointed tutor to the appellant, yet he had never taken upon himſelf the office, by concurring with the other tutors in any acts of adminiſtration, nor intromitted with the appellant's eſtate; that the ſubſcribing of the inventory (done out of friendſhip to the appellant, that he might know at his full age what eſtate his father had left) would not fix him in the acceptance of the office of tutor, becauſe it was only a preparatory act required by the ſtatute before entering upon the office, and the rule by which a tutor was accountable to his pupil when he intromits with the ſubject of that inventory. That the act 1696. c. 8. did not provide, that where a nomination of tutors, with ſuch qualities as in the preſent caſe is made, though on death-bed, that the nomination ſhould ſubſiſt, and yet the qualities be void. That the appellant, therefore, could not ſeparate the qualities from the nomination, but ought either to hold the nomination void, and inſiſt againſt the tutors as intromitters with his eſtate, in which caſe the reſpondent's father could not be affected; or if he held the nomination by the teſtator to be good, then the quality of being accountable only for intromiſſions would be a good defence for the reſpondent. For ſuppoſing the reſpondent's father had accepted of the office, (as he contended he never did) his acceptation being upon the faith of the quality expreſſed in the teſtator's will, he being at London when the nomination was made, could not know it was done on death-bed: Even ſuppoſing the nomination had been without any ſuch quality, yet by the expreſs directions in the will, William Watſon was appointed ſole factor, and tutor *ſine quo non*, and the teſtator's brother *ſine quo non* to the making up of the factor's accounts, ſo that the other tutors teſtamentary could never be accountable for the adminiſtration of William the factor, ſince he was not nominated by them, nor had they power to remove him.

The appellant, in reply, contended that the tutors having ac cepted their office, and made inventories of the eſtate, they wer certainly liable in ſolidum; for it imported not that William Wat ſon was tutor *ſine quo non*, and factor and manager by the teſtator' nomination, ſince his intromiſſions as factor, in the conſtruction o law, were the intromiſſions of the other tutors for whom he wa factor, and ſubjected them in the ſame way and manner as i they themſelves had intromitted. Nor did it alter the caſe tha he was named factor by the teſtator, ſince he was ſtill factor fo the other tutors, and was ordained to account with them yearl or at leaſt once in two years; and it was their fault that he di not ſo account with them.

Theſe matters in debate being reported to and conſidered b the Court, their Lordſhips, by three interlocutors on the 25th November 1713, 28th January and 8th December 171 "Found that the ſaid Robert Watſon, the reſpondent's father "ſigning the inventories, and judicially producing them by "procurator, did ſufficiently infer his acceptance of the tutory "and that he could not have the benefit of the quality in th "nomination from the act of parliament 1696, unleſs the wi "had been made in *Leige Pouſſie*."

So far the interlocutors of the Court were not appealed from.

The reſpondent afterwards recurred to a new defence, namel that his father's ſigning the inventories was no proof of his ac ceptance of the tutory, for the ſigning thereof was neither don judicially in Court, nor atteſted by ſubſcribing witneſſes, nor th name and deſignation of the writer of the inventory inſerte 1681, c. 5. therein, and, therefore, that by the act 1681, which require theſe qualities in all writings, it was abſolutely null and voi For ſuſtaining this allegation the reſpondent gave in a declaratio or certificate of the clerks to the Sheriff Court, Commiſſary Cour and Town Court of Edinburgh, of the uſual form and manne of receiving inventories from tutors and curators, wherein th writer thereof was either deſigned with witneſſes ſubſcribing t the execution by the tutors; or otherwiſe, they had been pro duced by the tutors and curators themſelves in Court, and ſigne there judicially by them and by the judge.

The appellant made anſwers, and the Court on the 27th o January 1715, "ſuſtained the defence, that the inventories ar "null and void, not being judicially ſigned, and wanting writer' "name and witneſſes, and therefore found the ſame not ſufficien "to infer the tutor's acceptance, unleſs there be poſterior deed "of adminiſtration inſtructed." The appellant reclaimed, an after anſwers for the reſpondent, the Court, on the 17th of Fe bruary 1715, "adhered to their former interlocutor." The ap pellant having inſiſted that the letter formerly produced by him in which the reſpondent's father conſented to the lending out o his money was a ſufficient poſterior act of adminiſtration; afte a debate on this point the Court on the 18th of February 1715 "found that the ſaid letter is not probative, nor an act of admi

"niſtratio

" niſtration liable to make the reſpondent account as if he had " been tutor." And the cauſe being called before the Lord Ordinary on the 19th of February, his Lordſhip " aſſoilzied the " reſpondent from the ſaid proceſs."

The appellant prevented a further petition to the court wherein he inſtanced ſome other acts of the reſpondent's father's adminiſtration, viz. his giving directions about the appellant's buildings, employing workmen therein and paying them, his putting the appellant to ſchool, and ordering his ſtay and maintenance there, and he prayed that he might be allowed a commiſſion for proving theſe and other acts of adminiſtration. After anſwers for the reſpondent, the Court, on the 26th of February 1715, " found the " preſent acts of adminiſtration condeſcended on, with the former, " are neither ſeparately nor jointly relevant, and therefore aſſoilzied the reſpondent."

The appeal was brought from " ſeveral interlocutory ſentences " or decrees of the Lords of Seſſion of the 27th January, and " the 17th, 18th, 19th, and 26th of February 1715." Entered 11th May 1715.

Heads of the Appellant's Argument.

The act of parliament 1681. c. 5. on which the reſpondent's objection to the inventories was founded, related only to private deeds; but it did not reſpect inventories which are of another nature, given in judicially to the court upon citation of the pupil's neareſt of kin, purſuant to the act of parliament 1672. c. 2. 1672, c. 2. Among the ſolemnities preſcribed by that act, theſe, of ſubſcribing witneſſes and deſignation of the writer are not to be found; and in the inventories in the preſent caſe, all that was preſcribed in that act was obſerved, viz. the ſubſcribing of the appellant's tutors and neareſt of kin, and of the judge and clerk in court.

Thoſe inventories were alſo ſigned by three of the appellant's neareſt relations, who were indeed the moſt proper witneſſes, and were called as atteſters thereof; and three copies made of the ſame.

If there had been any formality wanting, yet no tutor ought to take advantage againſt his pupil of his own informal deed, to which he is bound *ratione officii:* for, if it ſhould be otherwiſe, tutors may ſeem to act according to law, and at the ſame time may lay a foundation for their own diſcharge by their own acts, made with a deſign that they may not be evidence againſt them; for the poor pupils cannot be a check, but the law muſt be a check upon them.

One of the copies which had been ſigned by the reſpondent's father, and by the ſaid other tutors, and by the judge and clerk, as aforeſaid, was produced by the reſpondent himſelf; and it was never in the leaſt pretended by him, that his father's name thereto, or to either of the other copies, was not of his father's own proper hand-writing.

The declarations or certificates produced by the reſpondent were not made by the ſaid clerks upon any order of reference to them from the Court of Seſſion, but were voluntarily made by

them at the reſpondent's inſtance. Nor do they give any accou of the general practice of the nation in ſuch caſes, but only thoſe courts in Edinburgh, which do not contain a ſixth part the inſtances of the kingdom; and yet even in theſe declaratio there is one inventory mentioned to be exhibited as the inve tories in the preſent caſe were, without the writer's name or d ſignation, or atteſting witneſſes; nor was there any precede either produced or quoted of any inventory being rejected annulled for want thereof. And if the inventories in queſtio were any way defective, the judge ought not to have received the or granted adminiſtration thereon.

Though it was contended that the letter before-mentioned w no evidence, as wanting writer's name and witneſſes alſo, yet was never denied that the reſpondent's father's name, as conſen ing to the lending of the ſaid money, was of his father's own pr per hand-writing, and the appellant offered to prove the ſame b witneſſes.

Heads of the Reſpondents' Argument.

Though the act 1672, c. 2., ordaining tutors to make up a inventory, does not ſtatute, that theſe inventories ſhould be ſigne before witneſſes; yet it provides that theſe inventories ſhould b judicially produced before the judge, and an act made thereon and nothing is ſaid to be produced judicially, but what is ac knowledged and ſubſcribed before the judge, which this was not and the act 1681, c. 5. is general, and provides, that all writing to be ſubſcribed by any party, wherein the writer and witneſſe are not named and deſigned, ſhall be null. Since the date o that act no inventory without writer's name and witneſſes, or no ſubſcribed judicially, was ever exhibited or pleaded in judgment, as appears from the certificate of the proper officers where inventories are commonly recorded.

A tutor once accepting might be bound to make his own deeds formal, but ſince the reſpondent's father did not accept, neithe can he be bound to complete the deed, from which his acceptance is to be inferred.

The acts condeſcended upon by the appellant were no acts o adminiſtration as tutor, but only acts of humanity and friendſhip. They were, that the reſpondent's father concurred with the othe tutors in giving directions to repair a fence that had been made for defending the appellant's lands againſt the overflowing of the water; and that he employed workmen for that end; and that h had given his advice reſpecting the proper methods to be followe for the appellant's education. But it was never by law intended that the adviſing with tutors made the adviſer himſelf accountabl as a tutor. On the contrary, the reſpondent's father having neve concurred with the other tutors in diſpoſing of the goods an effects of the appellant, nor in the letting, ſelling, or orderin of his lands, nor ſuffered himſelf to be inſerted in any act as pre ſent at any ſederunt or meeting of the other tutors, are plain proofs that he never accepted of the office of tutor, nor wa looke

looked upon as tutor by thoſe who did accept and undertake the management.

The letters or miſſive, produced by the appellant, was not probative againſt the reſpondent's father, being neither holograph nor ſubſcribed before witneſſes, and ſo was void by the ſaid act 1681, c. 5. It was alſo plainly vitiated in the date, and ſo by the law of Scotland could be no proof; neither did it appear at what time it was ſubſcribed by the reſpondent's father.

After hearing counſel, *It is ordered and adjudged, that the ſaid petition and appeal be diſmiſſed, and that the ſaid interlocutory ſentences or decrees therein complained of be affirmed; and it is farther ordered, that the ſaid appellant do pay or cauſe to be paid to the ſaid reſpondent the ſum of 30l. for his coſts in this Houſe.* Judgment, 13 July 1715.

For Appellant, *Spencer Cowper. Rob. Raymond.*
For Reſpondent, *J. Jekyll. David Dalrymple.*

The judgment of the Court in that part of the cauſe, previous to the ſubject of the preſent appeal, by which it was found, that a tutor was not to have the benefit of a clauſe, that he ſhould not be accountable for omiſſions, but only for actual intromiſſions, where the will was not made in *Leige Pouſtie*, is worthy of notice, though by the ſubſequent judgment of the Court, the effect of this was ſet aſide.

Charles Menzies Eſq; of Kinmundie, Writer to his Majeſty's Signet, Uncle of the Reſpondents, - - - - - *Appellant;*

Helen, Barbara, and Jean Menzies, Siſters to the deceaſed Thomas Menzies of Kinmundie, and Robert Muir Merchant in Aberdeen, Huſband to the ſaid Barbara, and as their Aſſignee for his Intereſt, - *Reſpondents.*

Caſe 34. Fountainhall, 21 June 1712.

25th *July* 1715.

Sale—A perſon who had purchaſed lands at a public ſale, at 20 years purchaſe of a proved rental, afterwards claims deductions: 1ſt, Becauſe the teinds were held by a tack from the College of Aberdeen then near expired; 2d, Becauſe, as he alleged, the rental was too highly ſtated by one Chalder; 3d, Becauſe he was kept out of his purchaſe for ſix years, during which time the perſon in poſſeſſion only accounted for the rents, which were leſs than the intereſt of the price; 4th, A deduction of certain expences he had been put to, in adjuſting the debts due by the eſtate and in the perſon of the laſt poſſeſſor thereof. The Court having refuſed theſe deductions, and allowed the ſellers 30l. of expences, the judgment is affirmed.

In this caſe the purchaſer had been employed as agent to conduct the ſale, proof of rental, &c.

THOMAS Menzies, late of Kinmundie, left one ſon, and the reſpondents his daughters, all under age, to whom he had appointed John Hamilton, his brother-in-law, tutor and curator. The

The tutor, finding there were ſeveral conſiderable debts due by the ſaid Thomas Menzies, which would exhauſt the eſtate if not ſold, applied to the Court of Seſſion, ſetting forth the ſeveral debts due by the deceaſed, with a rental of the eſtate of Kinmundie, and praying leave, notwithſtanding the heir's minority, to ſell the lands to the higheſt offerer.

The appellant, the brother of the deceaſed and uncle of the reſpondents, was employed by the tutor in his profeſſion to take the proper methods for proving the ſaid debts and rental. A commiſſion was taken out accordingly, and the tenants and ſeveral other perſons were examined upon oath as to the rental of the lands; upon report of which, and upon comparing a liſt of the debts with the then conſtituted rental, amounting to 1124*l.* 7*s.* 6*d.* Scots, after all deductions, the Court, in July 1701, granted liberty to the tutor to bring the ſaid eſtate to a ſale, either in whole or in part, for the beſt price that could be got.

The lands were accordingly advertiſed for public ſale, and at the day appointed, the appellant offered 20 years purchaſe of the free rental, or 2000 merks for each chalder, or 100 merks of yearly rent. Alex. Gordon of Pitlurg, however, who was outbid by him at the ſale, entered into a poſterior agreement to give more than the price offered by the appellant: and, accordingly, on the 19th of January 1702, the tutor executed a diſpoſition of the eſtate in favour of Mr. Gordon as the higheſt offerer. Soon after the brother of the reſpondents died.

The appellant brought an action before the Court of Seſſion againſt the ſaid John Hamilton the tutor, Mr. Gordon of Pitlurg, and alſo againſt the reſpondents the daughters, as repreſenting their brother, to have it found that he was the true purchaſer of the ſaid lands of Kinmundie. After various proceedings in this action, the Court in 1703 found "that the practices "and contrivances of the tutor and Alexander Gordon were illegal, and that the ſaid Alexander Gordon having offered at the "ſale, and being then overbid was *in mala fide* to enter into any "after-articles with the ſaid tutor, in avoidance of the aforeſaid "ſale; and found that the appellant had the ſole right and title "to the ſaid lands of Kinmundie, by virtue of the articles of "ſale; and ordained the defenders to diveſt themſelves of any "right, title, or intereſt, they had to the ſaid lands, in favour of "the appellant, and ordained him to enter into a bond with ſecurity for the purchaſe-money of the ſaid lands, according to "the terms of the articles of ſale, and that within 40 days after "date of the decree of preference."

According to this decree, the bond was drawn and ſettled at ſight, and by the direction of the court; and thereby the purchaſe money, rated according to the then conſtituted rental, was payable by the appellant to the creditors upon the eſtate, in particular to the ſaid Alexander Gordon, who had paid part of the price, and had purchaſed in the rights of ſeveral creditors, and afterwards the overplus, if any ſhould be, was to be paid to the reſpondents. The appellant, after this, had an action with Mr. Gordon,

Gordon, to ſettle the amount of the claims of the latter, which depended for ſeveral years; but afterwards in 1707, the appellant having cleared with Mr. Gordon, entered into the poſſeſſion of the ſaid lands.

The price at which the appellant purchaſed was 22,486*l.* 13*s.* 4*d.* Scots; the mother of the reſpondents had an annuity paid to her yearly of the ſum of 333*l.* 6*s.* 8*d.* being the intereſt of 6,700*l.* Scots; and the debts amounted at the time of the ſale to 13,023*l.* 19*s.* 8*d.* ſo that the balance immediately to be paid to the reſpondents was only 2762*l.* 13*s.* 8*d.* Scots. Differences ariſing between the appellants and the reſpondents, after the marriage of Barbara, the reſpondents commenced an action of count and reckoning againſt the appellant before the Court of Seſſion, to compel payment to them of the balance of the ſaid price. In this action the appellant gave in a ſtated account of charge and diſcharge, wherein he charged himſelf with the full price of the ſaid lands, according to the bond entered into by him, and diſcharged himſelf by nine articles, five of which being for debts paid by him according to the tenor of the bond, were not controverted: the other four form the ſubject of the preſent appeal.

The 1ſt of theſe was a deduction from the price upon account of the teinds of the lands being made part of the rental, with the deduction of a yearly tack duty payable to the College of Aberdeen, from which they were held by two tacks nearly expired. After anſwers for the reſpondents, the Court at firſt decided in favour of the appellants' claim, but on the 22d of July 1712, "found that the appellant ſhould have no deduction of "the price, on account of any defect in the rights to the "teinds."

The appellant, 2dly, claimed a deduction from the purchaſe money, to compenſate an alleged deficiency in the rental, as being too highly ſtated by one Chalder. Upon this point a proof was taken for both parties, and the court, upon the 27th day of June 1713, "found that the appellant could have no deduction upon "the account of any ſhortcoming in the rental."

The third deduction claimed by the appellant was, that Mr. Gordon being poſſeſſed of theſe lands for ſix years, when the appellant entered to poſſeſſion, Mr. Gordon accounted to the appellant only for the rents of the lands; but that being leſs than the intereſt of the price paid by the appellant, and for which he was accountable, and the difference being about 840*l.* he claimed deduction thereof accordingly. Upon this point the Court, on the 19th of December 1712, "found that the appellant could have "no deduction upon account of the difference, between the rents "of the lands and the intereſt of the price."

The fourth deduction claimed by the appellant was the ſum of 1000*l.* Scots, as the coſts he had been at in adjuſting the debts claimed by Mr. Gordon, the benefit of which accrued to the reſpondents. The Court, on the 16th of December 1712, "found "that the appellant could have no deduction upon account of "his

" his expences in his action againſt Mr. Gordon." And to this interlocutor the court adhered upon the 17th of January and 5th of February thereafter.

The reſpondents afterwards petitioned the court to allow them their expences, and an account thereof was given in. On the 29th of July 1713, the Court found " that the appellant was " liable to the expences, and modified the ſame to 30*l.* ſterling."

Entered, 29 April 1715.

The appeal was brought from " ſeveral interlocutors of the " Lords of Council and Seſſion, made on the behalf of the re- " ſpondents."

Heads of the Argument.

The appellant again ſet out his claims on the four points before ſtated.

The reſpondents anſwered on the 1ſt. Point. That the appellant was the only perſon employed in the buſineſs of proving the rental and value of the eſtate; and when it was ſold, he knew all its circumſtances, the real value of the lands and what title there was to the teinds. When the eſtate was ſold, all that was agreed upon was, that the rental then was ſo much free rent *after deduction* of feu-duties, miniſter's ſtipends, and *teind tack duties*; and at that price it was bought *per averſionem*, without any diſtinction between teinds or any other part of the eſtate. Since the appellant knew what the reſpondents had, the obligation on their part muſt only be underſtood to extend to make what they had good; and nothing is conveyed to the appellant but the lands and theſe tacks of the teinds; and therefore the appellant can claim no more than what was conveyed to him.

On the 2*d Point.* The rental had been proved by the depoſitions of the tenants and others before the ſale, and the Court, upon adviſing theſe depoſitions, and the account of the true rental given in by the appellant himſelf, as agent for conducting the proof thereof, found the rental proved to be 1124*l.* 7*s.* 6*d.* Scots. At the rental ſo proved was the eſtate ſold to Mr. Gordon; at that rental Mr. Gordon accounted to the appellant for the ſix years he was in poſſeſſion, and the appellant had a conveyance from Mr. Gordon as he poſſeſſed it. The appellant, in his account againſt the reſpondents for this buſineſs, not only charges all his particular expences, but adds this article, " For the appellant's own pains in " ordering this proceſs of ſale, making up inventories of debts " rentals, &c. and carrying on the whole buſineſs thereof from " beginning to end, 100*l.* Scots." So that undoubtedly he knew what was the real value of theſe lands, and having bought the lands at that value, he ought to be concluded.

When a new probation was afterwards granted it was limited to the value of one or two particular farms. The appellant accordingly examined ſeveral witneſſes; but when the proof came to be adviſed, there did not appear the leaſt foundation for the deduction claimed. What was proved by him was only a ſmall encourage-

nent given for two years to a tenant after a great ſcarcity; and hat the rental proved at the ſale was the conſtant rental ever before the ſaid ſale.

On the 3*d Point.* The appellant ſuffered no loſs by Mr. Gordon's poſſeſſion; for had the appellant been in poſſeſſion himſelf, he could only have had the whole rent, and would have been accountable for intereſt. Beſides, it was the appellant's own fault, that Mr. Gordon continued ſo long in poſſeſſion, ſince he had judgment againſt Gordon to convey to him in 1703, which was two years after the ſale. Mr. Gordon required the appellant ſoon after, by way of inſtrument, to take poſſeſſion of the eſtate, but this the appellant declined; and at laſt Mr. Gordon was obliged to bring an action againſt the appellant to compel him to take the eſtate.

On the 4*th Point.* What the appellant did in the action with Mr. Gordon was for his own ſafety, becauſe he could only pay ſuch debts as were mentioned in the decree of ſale: and whatever expence was incurred in this matter was not occaſioned by the reſpondents, who were no parties to the action. And after all what the appellant pretends to have profited the reſpondents in, is not near half of what he claims as expences.

The reſpondents having been thus put to very great expence, they petitioned the court to have their expences allowed them, and gave in a bill, amounting to about 300*l.* ſterling, which they were ready to make oath they had really expended. The appellant made great oppoſition to this, and the Court allowed the reſpondents 30*l.* of expences, which ſum was all they got for the expences of the whole action.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the ſeveral interlocutors therein complained of be affirmed.* Judgment, 25 July 1715.

For Appellant, *N. Lechmere. John Cumyn.*
For Reſpondents, *Rob. Raymond. Will. Hamilton.*

Caſe 35. Forbes, 16 June 1710.

John Murray of Conheath, - - *Appellant*;
James Murray his younger Brother, Truſtee for Elizabeth Maxwell their Mother, - *Reſpondent*.

28th *July* 1715.

Fiar.—The proprietor of an eſtate, burdened with apprifings, dying, leaves two ſiſters, whoſe huſbands enter into a ſubmiſſion for themſelves, and as taking burden upon them for their wives, with a perſon who had or appeared to have right to ſome of theſe apprifings: by the decreet arbitral, they are decreed to be conveyed to the huſbands and their wives, the huſbands paying the price: the wives were fiars of theſe apprifings, and not the huſbands.

SIR John Maxwell of Conheath, in 1636, made a ſettlement of his eſtate to Alexander Maxwell his ſon, and the heirs male of his body, *quibus deficientibus hæredibus ſuis maſculis, ſucceſſoribus et aſſignatis quibuſcunque.* In terms of this ſettlement, a charter was taken from the ſuperior, upon which infeftment followed.

This Alexander Maxwell left iſſue a ſon John, (who died without iſſue), and two daughters, Elizabeth Maxwell, mother of the appellant and reſpondent, who married Gilbert Murray the father, and Margaret Maxwell, who married Alexander Maxwell of Park. Various apprifings had been obtained over the lands of Conheath; the rights to ſome of which were acquired by George Maxwell of Carnſalloch. This George Maxwell having entered to poſſeſſion, and taken away the charter cheſt and writings belonging to the eſtate, the ſaid Gilbert Murray of Urr, and Alexander Maxwell of Park, the huſbands of the ſaid Elizabeth and Margaret, whoſe brother was now dead, for themſelves and in name of their wives, commenced an action againſt George Maxwell of Carnſalloch, before the privy council, complaining of his forcible entry into and poſſeſſion of the eſtate, and carrying away the charter cheſt and writings. Mr. Maxwell was ordered to put the ſaid charter cheſt and writings into the clerk's hands, but a tranſaction took place between the parties which put an end to this action.

On the 25th of January 1677, a ſubmiſſion was entered into, which ſet forth, that the ſaid Gilbert Murray and Maxwell of Park, for themſelves, and as taking burden upon them for the ſaid Elizabeth and Margaret, their wives, elected one of the arbiters, and the ſaid George Maxwell elected the other, to whom they referred all actions then depending, or that ſhould ariſe between the parties concerning the lands of Conheath and the incumbrances thereon. This ſubmiſſion was ſubſcribed by the ſaid Gilbert Murray and Maxwell of Park, the huſbands, but not by the wives. On the firſt of February thereafter the arbiters pronounced their decree, whereby they ordained the ſaid George Maxwell to make over and ſurrender all the decreets of appriſing upon the lands of Conheath, to which he had any right or title in favour of th

ſaid Gilbert Murray and Alexander Maxwell, and their wives, ıally between them; the ſaid Gilbert Murray and Alexander .xwell paying 6100 merks Scots to the ſaid George Maxwell, l performing ſome other conditions contained in the ſaid decree. obedience thereto the ſaid Elizabeth and Margaret, with con- t of their ſaid huſbands, by a writing ſubſcribed by them, ınted a real ſecurity over the ſaid lands for the ſum mentioned the decree arbitral, to the ſaid George Maxwell; but before the nſaction was completed in this ſhape, and before George Max- ll had diveſted himſelf of any right in his perſon to the ſaid ıds, Gilbert Murray died. After his death, George Maxwell ade over and conveyed the titles in his perſon to the ſaid Alexan- r Maxwell, huſband to the ſaid Margaret, purſuant to the ſaid ecree arbitral, (Margaret having previouſly, as the reſpondent ates, conveyed her moiety to her huſband). The diſpoſition entions, that the ſaid Alexander had paid the full ſum awarded; d reſerves one half of the incumbrances to be redeemable by e heirs of the ſaid Gilbert Murray, or by the ſaid Elizabeth his idow, or either of them, who had beſt right thereto.

In 1695 Elizabeth, the mother, conveyed all her right to e ſaid lands and to the ſaid decree arbitral, to her ſon, reſpondent James, in truſt for her own uſe. In May 1696, appellant, who was a travelling chapman in England, executed favour of the reſpondent James, who was bred to the law, a ctory or power of attorney, giving full power to the reſpondent mes to recover, receive, and obtain all lands, tenements, or nts, or any other thing whatſoever pertaining and belonging to e appellant as heir to his father, and to tranſact and compound l matters relating thereto, with a proviſo of being accountable the appellant; and this factory alſo mentioned, that it ſhould without prejudice to the reſpondent of any acquiſitions made to be made by his own induſtry.

Soon after the reſpondent James redeemed an appriſing on the id lands in the perſon of one Maxwell of Miltoun. And he ntered into a contract of diviſion with the ſaid Alexander Max- ell of Park, by which the lands of Conheath were divided be- ween them, and the half of the money which had been paid and anded by the ſaid Alexander Maxwell, was repaid to him by e reſpondent. In this contract the reſpondent took burden upon mſelf both for his mother and for the appellant his brother, for y right competent to him.

The appellant afterwards brought an action againſt the re- ondent before the Court of Seſſion, to compel him to account r the rents and profits of the ſaid lands from the year 1696, and lſo to make over to the appellant the decrees of appriſing, which e reſpondent had acquired, and which the appellant contended d deſcend to himſelf as heir. After ſundry proceedings, rela- re to the import of the letter of attorney or factory and the de- ee arbitral, the court, by ſeveral ſubſequent interlocutors, de- eed in favour of the appellant.

A petition was afterwards preſented in the name of Eliz Maxwell, the mother, ſetting forth that the right ſhe had gr to the reſpondent was only in truſt for her uſe, and praying the interlocutors might be reverſed at her inſtance: And a ſame time the reſpondent put in a petition acknowledging hi right to be in truſt only; and he inſiſted upon ſundry acts by his mother, both prior and ſubſequent to the decree arb inferring her right of fee. The court, on the 10th of July 1 "found, that the wives of Gilbert Murray and Alex "Maxwell, and not their huſbands, were fiars of the appr "and other rights decreed by the decree arbitral to be con "to the huſbands and their wives." Sundry petitions given in for the appellant, but the court, on the 28th of and 12th of December 1713, and 23d of July 1714, adher their former interlocutor.

Entered 25 May, 1715.

The appeal was brought from "ſeveral interlocutory ſent "and affirmances thereof by the Lords of Council and Se "bearing date the 10th and 28th days of July and 12th of "cember 1713, and 23d of July 1714."

Heads of the Appellant's Argument.

Though the huſbands had no antecedent right before the a yet they might have purchaſed the lands or the appriſings affected the ſame *Tanquam quilibet*, having on their own per credit undertaken the price; and the appellant's father h died before the price was paid does not alter the matter, fi was paid thereafter by the appellant, his heir, or by the a lant's truſtee, out of the profits of his eſtate. The huſ entered into the ſubmiſſion for themſelves, and as taking bu upon them for their wives, but the wives do not ſubſcribe the ſa conſent to that agreement; and though the decree arbitral or the appriſings to be conveyed to the huſbands and their w yet it alſo ordains the huſbands to pay the price. By the l Scotland this will admit of no other interpretation, but tha huſbands and their heirs ſhould have the fee, and the wive life-rent, as in the caſe of a bond made payable, or deed gr to a huſband and wife.

(On the part of the appellant, various other facts are ſta tending to ſhew that the fee of the eſtate was not in the w but theſe facts being traverſed or denied by the reſponde not here ſtated on either ſide).

Heads of the Reſpondents' Argument.

The huſbands ſigned the ſubmiſſion in name of their w and as taking burden for them, and elected the arbiters exp for their wives; and the ſum to be paid is awarded again huſbands and in name of their wives. George Maxwell, the party on the other ſide is ordered to diveſt himſelf of a pretended right, &c. to the huſbands and the wives as p ſubmitters. Though the wives had not hitherto ſubſcribed, purſuance of the decree arbitral, they with conſent of their

nds granted a real ſecurity for the ſum awarded upon the ſaid
ds belonging to the wives, and of which they were then in
ſeſſion. And the huſbands, ſubſequent to the decree arbitral,
acknowledge, in ſeveral writings under their hands exhibited
the Lords of Seſſion, and mentioned in the decree, that the
perty was in the perſons of their wives; and in particular the
Alexander Maxwell took a conveyance for his wife before
orge Maxwell would convey to him, which, if there were any
n for doubt, is ſufficient to explain and prevent any queſtion
o the property of the ſaid lands. Though the ſaid real ſecurity,
ated by the wives with their huſbands conſent, was not ac-
ted of by the creditor, yet it was undeniable evidence of the
e and meaning of the parties. And no part of the money
ever paid by the appellant's father, but on the contrary by
reſpondent, in name of his mother, as her truſtee, and it
not be pretended that ever the reſpondent had any of the ap-
ant's money.

After hearing counſel, *It is ordered and adjudged, that the* Judgment, 28 July, 1715.
ion and appeal be diſmiſſed, and that the ſeveral interlocutory
nces and affirmances thereof in the ſaid appeal complained of be
med.

For Appellants, *J. Jekyll.* *W. Lechmere.*
For Reſpondents, *Tho. Lutwyche.* *David Dalrymple.*

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lliam Habkin, Belt-maker in Edinburgh, *Appellant;* Caſe 36.
ger Hog, Merchant in Edinburgh, - *Reſpondent.*

19th *Auguſt* 1715.

Annual Rent, Coſts, and Expences.—Two tradeſmen having contracted to clothe a regiment, and to divide equally under a penalty the ſums to be received by virtue of an aſſignment of off-reckonings delivered to each of them: one of them afterwards receives a new aſſignment of off-reckonings, and a ſum of money from the Treaſury, and refuſing to pay a balance due to the other, the Court ordained the perſon receiving the money, which, they found, fell under the firſt aſſignment, and their mutual contract, to pay the balance due to the other, which however was reſtricted to a ſmaller ſum than was claimed: but the Court having refuſed him damage and intereſt; upon appeal the judgment is reverſed, and the reſpondent is ordered to pay to the appellant the principal ſum found due to him, with the intereſt thereof, from the time the reſpondent received the remainder of the money; and the Court is ordered to cauſe the coſts and expences of the appellant in the action to be taxed and aſcertained and forthwith paid to him by the reſpondent.

No ſpecific ſum being here awarded, proceedings afterwards upon the complaint of the appellant, relative to the taxing of his expences by the Court of Seſſion, and reſolutions and orders of committees and of the Houſe thereon; a ſum allowed to the complainant for his ſubſequent expences, in taxing coſts.

January 1705, an agreement for cloathing a regiment of guards in Scotland was entered into between Lieutenant-neral Ramſay, the Colonel of the regiment, of the one part,

and the appellant and reſpondent of the other part: the appellant and reſpondent bound and obliged themſelves, jointly and ſeverally, their heirs, &c. before the time therein ſpecified, to deliver over to the ſaid General or his order, cloathing for his ſaid regiment: in conſideration whereof, on the other part General Ramſay bound and obliged himſelf to execute an aſſignment of the off-reckonings of the ſaid regiment unto the appellant and reſpondent until ſuch time as out of the ſaid fund they ſhould be fully paid and ſatisfied the ſum of 3151*l.* 10*s.* ſterling as the conſideration money for the cloathing the ſaid regiment.

In February thereafter the appellant and reſpondent entered into another contract between themſelves, reciting, That whereas they were bound jointly and ſeverally to cloath the ſaid regiment, and that it was juſt and reaſonable to relieve each other therein, therefore the appellant on the one part, obliged himſelf to cloath the firſt battalion of the regiment, and the reſpondent obliged himſelf to cloath the ſecond battalion, without any regard to the coſts and charges either might be at in furniſhing his reſpective battalion; and they expreſsly declared, that the money ariſing out of the fund to be aſſigned to them ſhould be equally divided between them: And each of them was reſpectively to perform the contract to the other under the penalty of 500*l.* to be paid by the party failing to the party performing the ſame.

The appellant and reſpondent furniſhed their reſpective ſhares of ſaid cloathing, but there being ſtill ſome things wanting which were not contracted for, the reſpondent furniſhed ſome of theſe upon his own ſeparate account, to the value of 106*l.* 1*s.* and the appellant furniſhed the remainder to the value of 27*l.* 8*s.* 4*d.* ſterling.

On the 29th of October 1705, the Earl of Dalhouſie, who then had the command of the ſaid regiment, granted two aſſignments of the ſaid off-reckonings or cloathing fund, one whereof was to the appellant for the ſum of 1603*l.* 13*s.* 4*d.* being his juſt ſhare of the total ſum of 3285*l.* 9*s.* 4*d.*; the other to the reſpondent for 1681*l.* 16*s.* for his ſhare and proportion. By each of theſe aſſignments the appellant and reſpondent were expreſsly *ſimul et ſemel* intitled to the payment of the cloathing money from and after Whitſunday 1705, until ſuch time as their reſpective ſums ſhould be fully and completely ſatisfied. Purſuant to theſe aſſignments ſeveral orders or precepts were iſſued from the then Commiſſioners of the Treaſury to the Receivers General, in conſequence of which the appellant and reſpondent received the amount of 2956*l.* 5*s.* 6d. ſterling, which was equally divided.

The reſpondent afterwards entered into a ſeparate agreement for cloathing one half of the ſaid regiment from 1ſt of October 1706 to 1ſt of February 1707, and was to have 631*l.* allowed him for the ſame, for which the Earl of Dalhouſie gave him further aſſignment of the off-reckonings. There being alſo a balance ſtill due to him upon the former account, he, on the 30th of April 1708, procured an order from the Commiſſioners of the

Treaſury

'reaſury upon the paymaſters of the army for 72*l.* of which alſo e received payment.

A balance on the original account being ſtill due to the appellant, when the reſpondent received the laſt-mentioned ſum of 72*l.* the appellant made application to him for payment of that balance, contending that the off-reckonings or cloathing-money of the regiment were appropriated for the payment of their reſpective aſſignments, and not otherwiſe applicable till they were paid; and that this order for payment to the reſpondent commenced before the appellant's aſſignment was ſatisfied, and the reſpondent's accepting of ſuch order was a breach of the articles of agreement. Upon the reſpondent's refuſal, the appellant gave him a charge of horning upon the articles of agreement, for the ſaid penalty of 500*l.* The reſpondent raiſed a bill of ſuſpenſion before the Court of Seſſion; and after ſundry preliminary proceedings, the foreſaid charge and contract were turned into a libel, and the appellant inſiſted for payment of the balance due to him with intereſt, ſince the money had been received by the reſpondent on his laſt order.

After ſundry further proceedings in this action, the court, on the 25th of June 1713, "found that the ſums paid to the reſpondent by virtue of the order for 72*l.* ſterling, being the cloathing-money from the 1ſt of October 1706 to the 1ſt of February 1707, fell under the aſſignment formerly made to the appellant and reſpondent, and under their mutual contract, whereby the money was to be equally divided between them under the penalty of 500*l.* and ordained the reſpondent to pay to the appellant a proportional part of the ſums received by the reſpondent in ſo far as the former aſſignment to the appellant remained unſatisfied." It was afterwards remitted to the Lord Ordinary to ſettle the accounts between the parties, and the appellant claimed a ſum of 216*l.* as due from the reſpondent; the reſpondent gave in an account alſo, and the Lord Ordinary at firſt found a balance of 192*l.* 7*s.* 2*d.* due to the appellant; but this ſum was afterwards reſtricted (by the reſpondent's making oath to ſundry articles of deduction, as the appellant ſtates) to the ſum of 166*l.* 19*s.* 1*d.* For this latter ſum decree was given by the court, in favour of the appellant, upon the 27th of February 1713; and this decree was acquieſced in by all the parties.

The appellant afterwards preſented a petition to the court, praying to have the intereſt of the ſum decreed for allowed to him from the time the reſpondent received it from the government, together with the expences of the action; or otherwiſe that they would order the reſpondent to pay the aforeſaid penalty incurred through his breach of the ſaid agreement, in lieu and ſatisfaction of the ſaid principal ſum, intereſt and expences. The court, by ſeveral interlocutors, the laſt of them upon the 24th of February 1714, "refuſed the deſire of the ſaid petition."

The appeal is brought from "ſeveral interlocutors of the Lords of Seſſion, and in particular a decree made by the ſaid Lords the 24th of February 1714." Entered, 3 June 1715.

Heads of the Appellant's Argument.

The reſpondent committed a manifeſt breach of the ſaid con and of the faith and truſt of copartnerſhip; for withou power or authority from the appellant, or giving any noti him, he in a clandeſtine manner made application to the tre and obtained from them an order or precept for the who mainder of the money due upon both the ſaid aſſignm When the reſpondent, too, appeared to the action in the below, he poſitively denied that he had received any of the lant's money, which put the appellant to great expence in ducing the books of the treaſury, the order of the Lords miſſioners to pay the ſaid 721*l.* and the reſpondent's recei the money. The appellant has been put to great troubl charges for four years ſucceſſively in this buſineſs; and he to have awarded to him his ſaid reduced principal ſum an intereſt thereof, together with his expences in the court bel be aſcertained by the appellant's own oath, in conſideratio the ſaid principal ſum was reduced in a great meaſure by th of the reſpondent; or otherwiſe the penalty contained i contract in lieu and ſatisfaction thereof.

Heads of the Reſpondent's Argument.

Though the court did decree the reſpondent to allow the b of this payment to the appellant, as to the balance due to l the former aſſignment, yet that was becauſe theſe prior ments were preferable upon the whole fund of cloathing-m nor did the court find any *mala fides* in the reſpondent. can be no manner of reaſon for expences againſt the reſpo eſpecially ſince the reſpondent never declined accounting wi appellant; on the contrary, he, by form of inſtrument, re him to ſettle accounts, but the appellant declined it. N any part of the expences in this action occaſioned by the r dent, but by the appellant's irregular proceedings in ſuin execution upon the agreement, without condeſcending upc particular breach of it, or liquidating any ſum due to him. occaſioned the bill of ſuſpenſion, and the greateſt part of t pences; and in all the points relative to this proceeding appellant's, wherein the reſpondent and he were adverſarie court gave it againſt the appellant by ſuſpending his charg firſt turning it and afterwards the contract into a libel, wh the court ſuſtained that contract as a foundation for an ac which was never oppoſed by the reſpondent. Had the ap given in a fair and juſt account the ſubſequent expences have been but ſmall, but the appellant inſiſting for 216*l.* balance due to him, and denying ſeveral articles the reſpc charged him with, this obliged the reſpondent to be at gre pence in recovering ſeveral vouchers of the account fro Commiſſioners and others, and by theſe deductions the ac was balanced 166*l.* 19*s.* 1*d.* which the reſpondent ſubmitt The coſts then were occaſioned by the appellant's irregula

ce

ceeding, and ſince the reſpondent ſubmitted to account and pay the balance; and ſince the appellant's demand was reſtricted from 216*l.* to 166*l.* 19*s.* 1*d.* there is no reaſon to load the reſpondent with expences. On the contrary, the appellant ought to pay expences; for it is an undoubted principle in the law of Scotland, that a purſuer claiming more than is really due to him, and occaſioning trouble and expence to the defender in defending that claim, and reſtricting it to a juſt balance, can never pretend to expences; but on the contrary, ought to pay them. The Court of Seſſion, therefore, refuſed the appellant's demand at firſt reading his petition, and without obliging the reſpondent to give in an anſwer. Nor can the appellant pretend to any part of the penalty, ſince the court has not found the reſpondent guilty of any breach of the articles: And as to intereſt there is no reaſon for that, ſince in this caſe it is neither due *ex pacto* nor *ex lege*, which are the only caſes where intereſt is allowed.

After hearing counſel, *It is ordered and adjudged that the ſeveral interlocutors and decree complained of in the ſaid appeal whereby the Lords of Seſſion did refuſe the appellant's demands by his bill exhibited to them as to intereſt and coſts be reverſed: And it is further ordered that the reſpondent do forthwith pay, or cauſe to be paid to the appellant, the principal ſum found due to him, with the intereſt thereof, from the time the reſpondent Hog received the remainder of the money due on the two firſt aſſignments made of the off-reckonings in queſtion. And further, that the ſaid Lords of Seſſion do cauſe the coſts and expences of the ſaid appellant in the ſaid ſuit to be taxed and aſcertained, and that the ſame when ſo taxed be forthwith paid to the appellant by the ſaid reſpondent.* Judgment, 19 Aug. 1715.

For Appellant, - *Rob. Raymond.* *John Cumyng.*
For Reſpondent, *J. Jekyll.* *Will. Hamilton.*

A petition of William Habkin was preſented to the Houſe and read, reciting the judgment on hearing his appeal, whereby it was remitted to the Lords of Seſſion, to tax the petitioner his coſts of ſuit; and complaining, "that the ſaid order is eluded," and praying, "that the ſame may be made effectual for the petitioner's relief, touching the coſts both here and in Scotland, by explaining the ſaid order in ſuch manner as to the Houſe ſhall ſeem juſt." This petition was referred to a committee to report thereon. Proceedings relative to theſe coſts, Journal, 1717-18. Feb. 27.

The Earl of Clarendon reported from the ſaid committee, That their lordſhips have accordingly conſidered the ſaid petition, and have examined into the facts therein alleged, and find that on hearing the petitioner's appeal, the 19th day of Auguſt 1715, the Houſe did reverſe the interlocutors," &c. (here the judgment is recited): "the committee likewiſe inform the Houſe, that the petitioner produced before them his bill of coſts, both here and in Scotland, amounting to 408*l.* ſterling, which he exhibited before the ſaid Lords of Seſſion on the 3d of February 1716; but they found that by the judgment of this Houſe the expences craved in the proceſs depending March 8.

" before the Lords of Seſſion were only remitted to be dete-
" mined by them, which were refuſed; and againſt which th
" petitioner appealed; and therefore remitted to the Lord Grang
" to modify the ſaid account, or report as he ſhould find juſt
" whoſe lordſhip, on the 29th of November 1717, having con
" ſidered the account of expences given in by the ſaid Willia
" Habkin of the ſuit before the Lords of Seſſion, amounting t
" the ſum of 951*l.* 8*s.* 6*d.* Scots, modified the ſame to the ſu
" of 760*l.* Scots, and decerned that is decreed therefore: bu
" upon a repreſentation made by Roger Hog, merchant in Edin
" burgh, the reſpondent to the petitioner's ſaid appeal, the 1
" of December following, the petitioner was, on the 5th of th
" ſame month, directed to ſee and anſwer; and in the mean tim
" the extracting the ſaid decree was ſtopped: and ſome ſho
" time after the ſaid account, with the inſtructions thereof, an
" the judgment of this Houſe, were ordered to be put into th
" clerk's hands; and it did not appear to the committee, th
" any further proceedings have been had thereupon. And the
" lordſhips, upon conſideration of the whole matter, are of op
" nion, that the ſaid Lords of Seſſion have rightly proceeded
" tax only the coſts of ſuit before them, and not the coſts of th
" petitioner's appeal to this Houſe; and that no final ord
" ſhould be made by this Houſe upon the petitioner's complain
" touching the ſaid coſts, until it be ſeen what coſts the Lor
" of Seſſion will allow: but in reſpect of the great delay whic
" it appears to the committee has been in the taxing the pe
" tioner's coſts ordered by this Houſe, the committee are likewi
" of opinion, the Lords of Seſſion ſhould tax and allow the p
" titioner the coſts he has or ſhall be put to in the taxation
" his ſaid coſts."

Which report being read by the clerk, was agreed to by th Houſe.

1719-20. March 10. A petition of Mr. Habkin was preſented to the Houſe an read, complaining " that the Lords of Seſſion in Scotland ha
" not taxed his coſts, purſuant to former orders of this Houſe
" and praying ſuch final order may be made, touching his coſt
" both here and in Scotland as ſhall be thought proper for the p
" titioner's relief." Which was referred to a committee to report.

1720. May 17. The Earl of Clarendon reported from the ſaid committe
" That their lordſhips having cauſed notice to be given of th
" complaint to one Roger Hog, merchant in Edinburgh, wh
" was the reſpondent to the petitioner's appeal, and being a
" tended as well by an agent on behalf of the ſaid Hog, as b
" the petitioner himſelf and his agent; their lordſhips took th
" ſaid petition into conſideration; and find, that this Houſe, o
" the 19th of Auguſt 1715, upon hearing the petitioner's appea
" did in part reverſe a decree of the Lords of Seſſion therei
" complained of; and directed them to cauſe the coſts and ex
" pences of the petitioner in the ſuit between him and the ſa
" Hog, to be taxed and aſcertained, and that the ſame, whe
" ſo taxed, ſhould be forthwith paid to the petitioner.

" Tha

"That the petitioner having exhibited the ſaid order, as alſo "his account of expences, to the ſaid Lords of Seſſion, the ſame "was by them referred to the Lord Grange, to be taxed accord- "ingly; and the ſaid account was by him modified to the ſum "of 63*l.* ſterling or thereabouts.

"That the committee were informed, the ſaid account or bill "of coſts was by the Lord Grange ſo taxed or modified *ex parte*, "and a decree made thereon; but upon the ſaid Hog's repre- "ſentation, in four or five days after, the petitioner was directed "to ſee and anſwer; and in the mean time the extracting the "ſaid decree was ſtopped; and ſome ſhort time afterwards, the "ſaid account with the inſtructions thereof, and the order of "this Houſe of the ſaid 19th of Auguſt were ordered to be put "into the clerk's hands: notwithſtanding this proceeding, the "petitioner, without complaining to the Court of Seſſion of the "taxation of the ſaid Lord Grange, thought fit to take up his "account, or bill of coſts, and vouchers from the clerk, and to ap- "ply to this Houſe by petition, complaining of the ſaid taxation, "and deſiring that the above-mentioned order of your lordſhips "on hearing his appeal might be made effectual for his relief, "touching his coſts both here and in Scotland: and a com- "mittee being appointed to conſider of the ſaid petition; their "lordſhips, on the 8th of March 1717, reported it as their opi- "nion, 'That the Lords of Seſſion had rightly proceeded to tax "only the coſts of ſuit before them, and not the coſts of the peti- "tioner's appeal to this Houſe; and that no final order ſhould "be made upon the petitioner's complaint, until it ſhould be "ſeen what coſts the Lords of Seſſion would allow:' but in re- "ſpect of the delay in taxing the petitioner's coſts, it was like- "wiſe their opinion, 'The Lords of Seſſion ſhould tax and allow "him the coſts he had or ſhould be put to in the taxation of "the ſaid coſts:' And your lordſhips agreeing with the com- "mittee in their ſaid report, the petitioner applied again to the "ſaid Lords of Seſſion, purſuant to the directions therein con- "tained: And here the committee think proper to obſerve, that "on the 11th of February 1717, but a few weeks before the "above-mentioned report was made, your lordſhips, upon a "petition from one Mrs. Lyon, touching the taxation of her "coſts in Scotland, did direct the Lords of Seſſion to tax and "aſcertain her coſts and expences article by article. And the "committee were informed, 'That the ſaid Lords of Seſſion "conceived it was expected by your lordſhips that they ſhould "obſerve the like method in the re-taxation of the petitioner's "account or bill of coſts, as was done in Mrs. Lyon's, and there- "fore proceeded accordingly. And having fully heard the parties "on both ſides in relation thereunto, and duly conſidered the "acts of regulation which are authorized by acts of parliament "in Scotland, regulating the fees about the Court of Seſſion "there, the whole Lords went through the ſaid account or bill, "article by article, and taxed the ſame at 25*l.* ſterling or there- "abouts, and allowed for coſts of ſuch taxation 8*l.* 6*s.* 8*d.* or

"there-

" thereabouts, the reaſons of which taxation are particularl
" expreſſed in their interlocutor for that purpoſe;" which ſum
" ſo taxed and allowed, the committee were likewiſe informe
" the ſaid Hog did immediately, by a notary, offer payment
" to the petitioner, but he refuſed to accept thereof:

" The committee, before they conclude, think proper only fu
" ther to obſerve, that your lordſhips having formerly been
" opinion, the Lords of Seſſion had rightly proceeded to tax onl
" the coſts of ſuit before them, and not the coſts of the pet
" tioner's appeal; and your ſaid order of the 8th March 171
" directing the Lords of Seſſion to tax and allow the petition
" the coſts he had or ſhould be put to in the taxation of h
" coſts, having been complied with in the allowance of the ſai
" 8*l.* 6*s.* 8*d.* for that purpoſe as afore-mentioned; that therefor
" the ſaid Lords of Seſſion have proceeded agreeably to the or
" ders of this Houſe, and have not diſregarded the authority o
" your lordſhips' laſt order, as particularly complained of in th
" petition.

" Which report being read by the clerk, was agreed to by th
" Houſe: And the order and judgment of this Houſe of the 19t
" of Auguſt 1715, on hearing the petitioner's appeal, being read

" 'It is ordered by the Lords Spiritual and Temporal in parlia
" liament aſſembled, that the ſaid petition be and is hereby diſ
" miſſed this Houſe.' "

Caſe 37. Katherine Lyon, Widow of John Lyon of Muireſk Eſq. - - - - *Appellant*;
The Right Hon. John Earl of Aboyne, an Infant, and others, - - - *Reſpondents.*

22d *Auguſt* 1715.

Coſts and Expences.—A perſon, having right to the balance of the price of a eſtate, which price was ſtipulated for in an agreement with penalty, obtai decrees in ſeveral different actions for principal and intereſt; and in the la of theſe actions, inſiſts for expences of all the former actions: the Cour having found that in that action the expences of the others could not b allowed becauſe there was *probabilis cauſa litigandi*, and ſince ſhe did not inſi for expences in her other actions; upon appeal the judgment is reverſed, an the Court ordered to cauſe the coſts and expences of all the actions to be tax and paid to the appellant.

Subſequent proceedings of the Houſe of Lords on two complaints by th appellant, that the Court had not taxed her coſts: the Houſe by a committ afterwards taxes the coſts and expences of the Court of Seſſion, and the ex pences of the ſaid two complaints, and ordains the reſpondent (a minor), hi tutors and curators, to pay 611*l.* 4*s.* 4½*d.* to the appellant for her coſts an expences.

ON the 3d of January 1667, Charles Earl of Aboyne, grand father to the reſpondent Earl John, entered into articles o agreement with John Lyon of Muireſk, the appellant's lat

huſband; whereby the ſaid John Lyon, on the one part, bound himſelf to make up a complete right and title in his perſon to certain lands in the ſhire of Banff, and thereupon to convey the ſame to the ſaid Earl Charles on or before the 15th of May then next enſuing, in conſideration whereof, the ſaid Charles Earl of Aboyne on the other part, agreed to pay the ſum of 9000 merks, on or before the then next term of Whitſunday; and both parties bound themſelves mutually to the performance of that agreement under the penalty of 3000 merks.

In purſuance thereof, Earl Charles paid to the ſaid John Lyon the ſum of 5500 merks, part of the price, ſo that there then only remained a balance of 3500 merks, and entered to poſſeſſion of the lands, in which he, and thoſe claiming right from him, continued ever after. John Lyon not having made up titles in his perſon according to the ſaid agreement, the ſaid Earl had recourſe to the legal diligences of horning, caption, and inhibition to oblige him to perform his part of the articles; and his Lordſhip afterwards in 1670 appriſed the ſaid lands.

On the 24th of May 1678, the ſaid John Lyon executed an aſſignation of the ſaid balance of 3500 merks to one John Riddoch. John Lyon died in December 1700, leaving the appellant in low circumſtances.

In 1706, 39 years after the date of the agreement Riddoch the aſſignee commenced an action before the Court of Seſſion againſt the reſpondent Earl John, a minor, for payment of the ſaid balance of 3500 merks with intereſt due thereon. In April 1707, the ſaid Riddoch aſſigned his right to the appellant after which the action was carried on in her name. The reſpondents contended that the apellant's late huſband had not performed his part of the agreement, but the appellant inſiſting that the reſpondent and his predeceſſors had been in poſſeſſion of the lands for 40 years, and that therefore ſhe was entitled to the intereſt of the money, as ſhe would have been to the profits, ſhe craved decree for intereſt only. On the 7th of November 1707, the Court decreed the reſpondent to pay the intereſt due on the ſaid 3500 merks, and this decree was extracted on the 28th of February 1708.

The appellant by virtue of this decree arreſted the rents in the hands of the reſpondent's tenants; and brought an action of forth-coming againſt them to pay theſe rents to her till ſhe ſhould be ſatisfied for the intereſt decreed to her. Oppoſition was made by the tenants and by Lord and Lady Kinnaird, who had a jointure upon theſe lands, but in June 1709, the Court decreed the tenants to pay their rents to the appellant till ſhe ſhould be ſatisfied the ſaid intereſt in arrear; and this decree was adhered to on the 23d of February 1710. Lord and Lady Kinnaird afterwards brought an appeal againſt the ſame, but their appeal was diſmiſſed with 40*l.* coſts to the preſent appellant. Caſe, No. 5.

She alſo brought an action of adjudication againſt the reſpondent's eſtate, in which ſhe obtained decree in her favour on the 10th of June 1709; and afterwards brought an action of mails and duties againſt the reſpondent's tenants to pay their rents to her.

And

And further ſhe brought an action againſt the reſpondent fo recovery of the balance of 3500 merks, due on the original prin cipal ſum, and of a part of the penalty in the agreement corre ponding thereto. On the 10th of February 1710, ſhe alſo ob tained decree in this action in her favour for 1637*l.* 14*s.* Sco of principal ſum due to her after all deductions, together with proportion of the penalty, to bear intereſt till paid.

The reſpondent brought a bill of ſuſpenſion of theſe ſeven decrees. But on the 12th of February 1712, the Court ad hered to their former decrees, with this quality, that if princip and intereſt ſhould be paid on or before the 15th of May the next, the reſpondent ſhould be free from the penalty. The re ſpondent reclaimed againſt this interlocutor but after variou proceedings, the ſame was adhered to, on the 27th of Februar 1714.

In the mean time, the appellant had preſented a petition to th Court, ſtating that ſhe had been put to great expences in recover ing the ſmall ſum due to her, that ſhe had prevailed in all th actions brought by her or againſt her, and therefore praying tha the Court would allow her the expences of theſe actions. Th Court on the 26th of February 1714, found "that in this proceſ "the expences of the appellant's other proceſſes could not be allow "ed her, ſince there was *probabilis cauſa litigandi*, and ſince ſhe di "not inſiſt for expences in her other proceſſes." The appellan reclaimed and the Court on the 10th of June 1714, "adhered t "their former interlocutor, and modified her expences to 25c "Scots." She again reclaimed, and contended that by the inte locutor of the 12th of February 1712, it was declared that princi al and intereſt was paid on the 15th of May then nex the reſpondent ſhould be free from the penalty; but that as th reſpondent had not made payment in terms of that interlocut ſhe was entitled to the penalty. The Court on the 24th of Jun 1714, "adhered to their former interlocutors."

Entered, 13 May 1715.

The appeal was brought from "ſeveral interlocutors of th "Lords of Council and Seſſion of the 26th February, the 10th o "June 1712, the 26th of Feburary 1714, and the 24th o "June 1714 (*a*).

Heads of the Appellant's Argument.

Coſts are in caſes ſimiliar to the preſent to be allowed by th law of Scotland: and the appellant made it appear in the Cour below, that her expences amounted to more than 400*l.* ſterling beſides the expences of the laſt action.

The appellant has been forced to leave her native country, an ſpend nine years in obtaining ſeven decrees, before ſhe could come at her money, due upon ſo clear a demand, againſt the moſt vexatious and obſtinate defence.

(*a*) In this caſe, the interlocutors appealed from cannot be correctly fixed by their dates; but in the appellant's caſe, ſhe mentions, that ſhe "appeals from theſe interlo "cutors by which ſhe was refuſed part of the penalty and her expences or coſts."

Though

Though there have been different actions, yet they were ſuch were neceſſary by the law of Scotland, and all founded upon e ſame moſt clear demand, and occaſioned by the reſpondent's roundleſsly conteſting her indiſputable right. And the appellant ld much better have ſat down under the loſs of her debt, if e ſhall not be re-imburſed the expences ſhe was forced to be , in proſecuting her right.

Heads of the Reſpondent's Argument.

The appellant founded her argument in the Court below upon e acts of the Scots Parliament, 1587 c. 43. & 1592 c. 144. ith regard to damages and expences. But from theſe and other cts it appears that the Judges have the ſole power of modifying xpences; and the intent of the acts being to ſuppreſs vexatious w ſuits, therefore the Judges have ever conſtrued them by ob-rving that intent, viz. in allowing expences where an action ap-ears vexatious, and in acquitting therefrom, when there is *proba-lis cauſa litigandi*, as they found in the preſent caſe. It is not ob-ous therefore, after what manner theſe acts, or any of them can conſtrued for the benefit of the appellant, who all along has peared ſo litigious and vexatious to a minor, and notwithſtand-g ſhe has recovered and received principal intereſt and coſts, r which ſhe has given a diſcharge, yet ſtill inſiſting for penalty d additional expences, ſhe has appealed from ſeveral interlocu-ry ſentences refuſing the ſame.

After hearing counſel, *It is ordered and adjudged that the veral interlocutors complained of in the ſaid appeal whereby the ap-ellant was refuſed her expences or coſts be reverſed; and it is rther ordered, that the Lords of Seſſion do cauſe the coſts and xpences of all the ſuits and proceſſes between the appellant and reſpon-ent mentioned or referred to in the ſaid appeal, to be taxed and aſ-ertained, and that the ſame when ſo aſcertained be forthwith paid to the ſaid appellant.* Judgment, 22 Auguſt, 1715.

For Appellant, *J. Jekyll. Rob. Raymond.*
For Reſpondent, *N. Lechmere. John Cumyng.*

On the 21ſt of December 1717, a petition was preſented to the Houſe, in the name of Katherine Lyon, reciting the judg-ment on her appeal, and praying that "their lordſhips would "pleaſe to enforce the ſame by effectually obliging the Lords of "Seſſion in Scotland to cauſe the petitioner's bill of coſts to be "taxed and aſcertained, according to the acts of regulation of "fees; and that the ſame ſhould be then forthwith paid her "without further ſuit." This petition was referred to a com-mittee. Proceedings relative to the taxing of expences in this caſe, 1717, Dec. 21.

The Earl of Clarendon reported from the Lords committees, "That the committee have accordingly conſidered the matter of "the ſaid petition; and in reſpect of the facts therein alleged, "acquaint your lordſhips, that on hearing the petitioner's appeal, "the ſaid 22d of Auguſt, this Houſe did reverſe the ſeveral in-"terlocutors 1717-18. Feb. 11.

" terlocutors of the Lords of Seſſion therein complained of, where-
" by ſhe was refuſed her expences or coſts; and ordered the Lords
" of Seſſion to cauſe all the coſts and expences of all the ſuits and
" proceſſes between the appellant and reſpondent, mentioned or
" referred to in the ſaid appeal, to be taxed and aſcertained; and
" that the ſame, when ſo aſcertained, ſhould be forthwith paid to
" the appellant: the committee further inform the Houſe, that an
" authentic copy of the proceedings of the Lords of Seſſion, ſince
" the making the ſaid order and judgment, had been, on the pe-
" titioner's part, produced before the committee; by which it
" appears that the Lords of Seſſion had, on conſideration of the
" petitioner's account of coſts and expences exhibited to them,
" and produced before the committee, amounting to 538*l.* 4*s.*
" ſterling, modified the ſum of 100*l.* ſterling in name of coſts
" and expences, to be paid to the ſaid Mrs. Lyon *Attour*, that
" is above the ſeveral ſums already modified and paid to her for
" expences in the proceſs above-mentioned: And it appeared to
" the committee, that the ſums mentioned to have been before
" paid to her amounted only to the ſum of 250*l.* Scots, being
" about 20*l.* ſterling, which in the ſaid account, out of one article
" is mentioned to be deducted: There was alſo on the part of
" the petitioner produced to the committee the articles of regu-
" lation concerning the Seſſion, approved by his late Majeſty
" King William, in purſuance of an act paſſed in Scotland in the
" 4th ſeſſion of King William and Queen Mary's firſt parliament,
" intitled, 'Commiſſion for regulation of judicatories;' which
" articles regulate the ſeveral fees and charges to be paid in rela-
" tion to proſecutions in the ſaid court; and by the ſaid articles
" it is expreſsly directed, 'That in all cauſes where the Lords
" at the concluſion thereof, ſhall find the ſuccumber,' that is,
" the party who loſes the cauſe 'to have been calumnious or
" litigious they ſhall take in an account from the party prevailing
" upon his oath, of the expences and damages that he hath been
" put to in that proceſs; and that then they decern, or, in caſe
" of extravagance tax and modify the ſaid expences and damages
" to be paid by the ſuccumber to the party prevailing as ſaid is.'

" That the committee having been directed by the Houſe to
" ſearch for precedents, think it proper to inform your lordſhips,
" that they find none of the like nature; the only one inſiſted
" on, on the part of the reſpondents (being the caſe of Sir
" Andrew Kennedy) widely differing from the caſe of the peti-
" tioner:

" And upon the whole matter the committee are of opinion,
" that the Lords of Seſſion have not taxed and aſcertained the
" petitioner's coſts and expences agreeably to the forementioned
" order and judgment of this Houſe, on hearing her appeal; and
" are likewiſe of opinion, that the ſaid Lords of Seſſion be di-
" rected to tax the petitioner's coſts, expences, and damages,
" according to the articles of regulation; and to note what extra-
" vagancies they ſhall diſallow;"

" Which

" Which report was read by the clerk entire. And the firſt reſolution being again read, the ſame was agreed to by the Houſe. Then the other reſolution being likewiſe read a ſecond time, was, with ſome amendments, agreed to by the Houſe, and ordered as follows:

" ' Ordered, that the ſaid Lords of Seſſion be and are hereby directed to tax and aſcertain the petitioner's coſts and expences, by conſidering the particulars of ſuch coſts and expences, article by article.' "

Mrs. Lyon preſented a ſecond petition to the Houſe, complaining, 1719. Dec. 19.
' That the Lords of Seſſion in Scotland have not taxed the petitioner's coſts and expences agreeably to the order and judgment ' of this Houſe, of the 22d Auguſt 1715, and the order of the ' 11th February 1717, and praying relief;"—which was referred to a committee.

The Earl of Clarendon reported from the Lords committees: 1719-20. Feb. 9.
' That the committee have accordingly conſidered the ſaid petition, and heard counſel thereupon, as well on behalf of the ' Earl of Aboyne as for the petitioner, and think proper to acquaint your lordſhips with the matter, as it appeared before them:"

(Here are recited the judgment, 20th Auguſt 1715, and proceedings thereupon, before the Court of Seſſion; Mrs. Lyon's petition of 21ſt December 1717, and the reſolution and order of the Houſe, 11th February 1717-18.) " Which (laſt-mentioned) order being likewiſe by the petitioner ſoon after exhibited to the ſaid Lords, and therewith a bill, amounting to 785*l.* the ſaid lords did not only reject the whole charges ſhe had been at before them, on their ordering her the ſaid 100*l.* in the name of coſts, which amounted to about 23*l.* 15*s.* ſterling; but alſo ' the charges ſhe had been at in her complaint to the Houſe ' thereupon, which amounted to 50*l.*; and gave for reaſon, ' That ſuch coſts fell more properly to be taxed by your Lordſhip's:' And in taxing the petitioner's ſaid bill, the ſaid lords ' diſallowed all the articles therein charged for counſel's fees, in ' drawing anſwers to the ſaid Earl's reclaiming bills or petitions, ' amounting to upwards of 100*l.* ſterling: though ſhe was obliged " by the interlocutors of the ſaid Lords of Seſſion to give in all " the ſaid anſwers to ſuch reclaiming bills or petitions, and to " have the ſame drawn and ſigned by counſel; or in default " thereof, ſhe muſt have loſt the whole effect of her ſuit: And " the committee upon this occaſion think proper to take notice, " that the ſaid lords did, notwithſtanding, allow the petitioner " her charges for printing the ſaid anſwers, and the fees paid to " the clerk in putting in the ſame: The committee further ac- " quaint your lordſhips, that the Lords of Seſſion likewiſe refuſed " to allow the petitioner what ſhe was from time to time obliged " to pay for inrolling her cauſe before the Lord Ordinary, money " to clerks' ſervants, extractor's ſervants, and to her agent or ſoli- " citor, and ſeveral other expences: But the counſel for the ſaid " Earl inſiſting that ſuch particulars of coſts are not uſually

" allowed

" the petitioner for her coſts; and to report the ſame to the " Houſe."

The Earl of Clarendon reported back from the Lords commit- Feb. 26.
tees, " That an atteſted copy of the petitioner's bill of coſts, " which was by her exhibited to the Lords of Seſſion in Scotland, " was laid before the committee, who in the firſt place proceeded " to conſider the nature of ſuch coſts therein as were by the ſaid " Lords of Seſſion diſallowed; and in ſuch conſideration were " attended by an ancient practiſer in cauſes before the Lords of " Seſſion; and having heard him, upon oath, as to the ordinary " allowances made for the ſeveral articles in the petitioner's ſaid " bill ſo diſallowed as aforeſaid, and particularly conſidered the " ſame are of opinion, that moſt of them ought to have been " allowed; and therefore, having cauſed ſuch of the ſaid articles " to be caſt up, they find the ſum total thereof amounts to " 186*l.* 4*s.* 4½*d.*:

" The committee alſo, upon their enquiry into the other diſ- " allowances of the ſaid Lords of Seſſion of the petitioner's " coſts and expences, were informed that the ſaid lords wholly " diſallowed all the coſts, charges, and expences ſhe had been at " upon her laſt application to this Houſe, when ſhe was obliged " to complain that the Houſe of Lords had not taxed her her " coſts, purſuant to your lordſhips order, on hearing her appeal; " which coſts upon that application, as ſhe alleged and offered " to make oath, amount to 50*l.* and upwards, excluſive of the " whole incident charges and damages ſhe had been put to in " proſecuting her ſeveral ſuits for thirteen years paſt; but the " ſaid Lords of Seſſion, on their refuſal, gave for reaſon, that the " charges of the ſaid application fell more properly to be taxed by " this Houſe:

" The committee were likewiſe informed, that the coſts and " charges which the petitioner has neceſſarily been already put " to upon her preſent application to your lordſhips, and the " further charges which will unavoidably be incurred before ſhe " can reap any advantage thereby, will not be leſs, than the " expences which her ſaid former application occaſioned, " mounting as is above-mentioned to upwards of 50*l.*

" The committee, upon this whole matter, think it further ne- " ceſſary to acquaint your lordſhips, that the coſts taxed upon " the petitioner's bill, by the ſaid Lords of Seſſion, amount to " 295*l.* beſides her charges of extracting their decree, which " they have alſo allowed, though not aſcertained; and which " the committee were informed by the ſame ancient practiſer " will amount to upwards of 30*l.*; that the coſts diſallowed by " them, which the committee conceive ſhould have been allowed, " amount to 186*l.* 4*s.* 4½*d.* which, with the coſts of the ſaid two " applications to this Houſe, amounting to 100*l.* make together " in the whole the ſum of 611*l.* 4*s.* 4½*d.*

" Which being read by the clerk intire, 'It is ordered, that the " ſaid report be taken into further conſideration on Monday next, " and the lords to be ſummoned.'"

" allowed by the Lords of Seſſion, the committee think proper " further to acquaint your lordſhips, that there was produced " before them, on the part of the petitioner, a declaration or " certificate under the hands of ſeveral advocates, ancient prac- " tiſers before the Lords of Seſſion, teſtifying, ' That the dues " claimed in the account of expences given in by her in the " taxing of her coſts, as paid to the Lords of Seſſion's principal " ſervants, to advocate's ſecond ſervants, to clerks and ex- " tractors ſervants, and to agents, for their agenting proceſſes " and pleas of law, were, many years before the petitioner's " proceſs, in uſe to be paid by all perſons whatſoever, whether " purſuers or defenders before the ſaid Lords; inſomuch " that no perſon now can, nor could for many years paſt, " proſecute or defend any ſuit at law, without paying the ſaid " dues to the above-mentioned perſons: And that the lawyers " in that part of Great Britain do receive their conſultation " money for drawing anſwers to petitions, ordained to be an- " ſwered by the ſaid Lords; which are the ſame with the above- " mentioned reclaiming bills, as well as for drawing the ſaid " petitions; and generally for all papers ſigned by lawyers pre- " ſented to the ſaid lords:'

" The committee think fit alſo to acquaint your lordſhips, " that they obſerved a diſtinction made by the Lords of Seſſion, " that the former order of this Houſe directed only their taxing " ſuch coſts and expences as preceded the petitioner's ſaid appeal; " though your committee, upon their enquiry, obſerved the ſaid " lords have allowed her ſeveral *Items* of coſts ſince the determi- " nation of this Houſe on hearing the ſame, particularly upon " the petitioner's application to the ſaid lords, purſuant to your " lordſhips' laſt order, directing them to tax her coſts, article by " article:

" The committee, before they conclude, likewiſe think it " proper to inform your lordſhips, that though the petitioner's " bill of coſts before-mentioned, given in to the Lords of Seſſion, " amounted to 785*l.*; yet the ſaid lords, by diſallowing or reducing " divers articles therein contained, have taxed the ſame at a " ſum under 300*l.* which is in no ſort a compenſation to the peti- " tioner for her coſts; in regard it was alleged, that though ſhe " was allowed her whole bill, yet the ſum would fall much " ſhort of the real coſts, which the aforementioned ſuits and " proceſſes have neceſſarily occaſioned her.

" And the committee conceiving this to be a matter wherein " the honour and judicature of this Houſe is very nearly con- " cerned, they declined coming to any opinion; but humbly " leave the ſame to your lordſhip's conſideration."

" Which being read by the clerk intire, ' It is ordered, that " the ſaid report be taken into further conſideration on this day " ſe'nnight; and the lords to be ſummoned.' "

1719-20. Feb. 16. The ſaid report being again read by the clerk, and debate thereupon, " It is ordered, that the ſaid report be referred back to the " ſame committee, to conſider what further ſums ſhould be allowed

" the

" the petitioner for her coſts; and to report the ſame to the " Houſe."

The Earl of Clarendon reported back from the Lords committees, " That an atteſted copy of the petitioner's bill of coſts, " which was by her exhibited to the Lords of Seſſion in Scotland, " was laid before the committee, who in the firſt place proceeded " to conſider the nature of ſuch coſts therein as were by the ſaid " Lords of Seſſion diſallowed; and in ſuch conſideration were " attended by an ancient practiſer in cauſes before the Lords of " Seſſion; and having heard him, upon oath, as to the ordinary " allowances made for the ſeveral articles in the petitioner's ſaid " bill ſo diſallowed as aforeſaid, and particularly conſidered the " ſame are of opinion, that moſt of them ought to have been " allowed; and therefore, having cauſed ſuch of the ſaid articles " to be caſt up, they find the ſum total thereof amounts to " 186*l.* 4*s.* 4½*d.*: Feb. 26.

" The committee alſo, upon their enquiry into the other diſ- " allowances of the ſaid Lords of Seſſion of the petitioner's " coſts and expences, were informed that the ſaid lords wholly " diſallowed all the coſts, charges, and expences ſhe had been at " upon her laſt application to this Houſe, when ſhe was obliged " to complain that the Houſe of Lords had not taxed her her " coſts, purſuant to your lordſhips order, on hearing her appeal; " which coſts upon that application, as ſhe alleged and offered " to make oath, amount to 50*l.* and upwards, excluſive of the " whole incident charges and damages ſhe had been put to in " proſecuting her ſeveral ſuits for thirteen years paſt; but the " ſaid Lords of Seſſion, on their refuſal, gave for reaſon, that the " charges of the ſaid application fell more properly to be taxed by " this Houſe:

" The committee were likewiſe informed, that the coſts and " charges which the petitioner has neceſſarily been already put " to upon her preſent application to your lordſhips, and the " further charges which will unavoidably be incurred before ſhe " can reap any advantage thereby, will not be leſs, than the " expences which her ſaid former application occaſioned, " amounting as is above-mentioned to upwards of 50*l.*

" The committee, upon this whole matter, think it further ne- " ceſſary to acquaint your lordſhips, that the coſts taxed upon " the petitioner's bill, by the ſaid Lords of Seſſion, amount to " 295*l.* beſides her charges of extracting their decree, which " they have alſo allowed, though not aſcertained; and which " the committee were informed by the ſame ancient practiſer " will amount to upwards of 30*l.*; that the coſts diſallowed by " them, which the committee conceive ſhould have been allowed, " amount to 186*l.* 4*s.* 4½*d.* which, with the coſts of the ſaid two " applications to this Houſe, amounting to 100*l.* make together " in the whole the ſum of 611*l.* 4*s.* 4½*d.*

" Which being read by the clerk intire, 'It is ordered, that the " ſaid report be taken into further conſideration on Monday next, " and the lords to be ſummoned.' "

1719-20. March 1.

" The ſaid report being again read by the clerk and agree
" the following order was made:
" It is ordered by the lords ſpiritual and temporal in parlia
" aſſembled, that the ſaid Earl of Aboyne, his tutors and c
" tors do forthwith make payment to the ſaid Katherine Lyc
" the ſum of 611*l.* 4*s.* 4½*d.* for her coſts and expences in the
" ral ſuits and proceſſes mentioned or referred to in her ſaic
" peal, and in reſpect of further coſts ſince incurred, upon
" ſeveral applications for obtaining relief upon the matters c
" plained of in her ſaid petition."

In the Dictionary of Deciſions, vol. 1. p. 439. *Implied Diſcl and Renunciation*, many deciſions are ſtated for the doctrine, after extracting a decreet expences are not to be allowed: but doctrine in the preſent appeal was reverſed.

Caſe 38. Fountain-hall, 13 July 1709.

John Goddard, Gentleman, - - *Appellan*
Sir John Swinton, Baronet, - - *Reſponde*

30th *Auguſt* 1715.

Foreign Decree.—The effect of a judgment of the Court of King's E when founded upon by a purſuer againſt a defender in the Court of Seſſi
Homologation.—The defender had in England been ſurrendered by his bail were diſcharged; and the defender executed an inſtrument, importin the judgment ſhould not be releaſed by ſuch diſcharge; this inſtrument not to homologate the judgment.

THE appellant's mother Urſula, as adminiſtratrix of his father Robert Goddard, deceaſed, in October 1700 c menced an action againſt the reſpondent before the Cour Seſſion for payment to her of the ſum of 404*l.*, with intereſt f the year 1680; ſtating the circumſtances of the caſe to be:

That in 1675, the reſpondent being at London and dealing merchant, he and the ſaid Robert Goddard and nine other per executed articles of agreement under their hands and ſeals to come partners in a ſhip called *The John and Thomas of London*, her cargo, to the value of 3800*l.* on a voyage to Guinea; an the parties, under a penalty of 6000*l.*, covenanted to account and pay each other for ſuch proceeds of the cargo as ſhould c to each partner's hands:

That by the ſaid articles Mr. Goddard was declared to l four parts of 32 in the ſaid ſhip and cargo; and the ſhip, p ing ſucceſsful in her voyage, returned to the port of Londo 1677, and the diſpoſal of the cargo was committed to the reſ dent, as caſhier and agent for the partnerſhip: he received the to the value of 5403*l.* 9*s.* 4*d.*, whereof 675*l.* 8*s.* 8*d.* was Goddard's ſhare; and the reſpondent having paid him 285*l.* 8*d.*, there remained due to him 390*l.*:

T

That after Mr. Goddard's death, the ſaid Urſula, his widow adminiſtratrix, brought an action of covenant upon the ſaid cles, in the Court of King's Bench againſt the reſpondent, for ſaid whole ſum of 675*l.* 8*s.* 8*d.* received by him, ſetting forth her declaration the covenant in the articles, and alleging in , that the reſpondent had been appointed caſhier of the ſaid go, and had received out of the ſame 5403*l.* 9*s.* 4*d.*, of which ſaid ſum of 675*l.* 8*s.* 8*d.* was her late huſband's ſhare:

That the reſpondent demurred generally to the ſaid declaration, reby admitting the facts ſtated to be true; and after ſeveral journments the demurrer upon argument being over-ruled, a it of inquiry was iſſued, which was executed; and the jury on ſtating the account found the reſpondent indebted to the ceaſed 390*l.*, which ſum they aſſeſſed for damages to the adiniſtratrix; and thereupon, in Hilary term 1680, judgment was ned and entered up for her againſt the reſpondent for the ſaid ol. and for 14*l.* coſts, in all 404*l.* ſterling:

That the reſpondent being unable to ſatisfy the ſaid debt, preiled on Mrs. Goddard not only to forbear ſuing to execution, t alſo to diſcharge his bail; and accordingly, on the 28th of bruary 1680, ſhe, by an inſtrument under her hand and ſeal, hich was drawn and prepared by the reſpondent and atteſted himſelf,) taking notice of his inability to pay the debt ſo reered againſt him, declared that his bail ſhould ſtand diſcharged, d that they might be at liberty to vacate their recognizance: d the reſpondent by a writing indorſed on this inſtrument, and ned by him and one of the bail, declared "that no clauſe or expreſſion therein mentioned is intended, or ſhall be conſtrued or meant to intend the releaſe or diſcharge of the judgment within mentioned, obtained by the within Urſula Goddard againſt the ſaid John Swinton; or is it intended or meant thereby, in any ways or means howſoever or whatſoever, to preclude the ſaid Urſula Goddard from obtaining any advantage upon the ſaid judgment againſt the ſaid John Swinton for the recovery of her debt due from the ſaid John Swinton to the ſaid Urſula Goddard:"

That the reſpondent being reſtored to his eſtate in Scotland pon the proſpect of which Mrs. Goddard had given him forearance), but refuſing to make payment of what was owing by im, the ſaid Urſula's action concluded that the ſaid judgment f the Court of King's Bench might have the authority of the ourt of Seſſion interpoſed thereto, and that Sir John might be ecerned to pay the ſaid 404*l.* ſterling with intereſt, and that all xecution might be directed thereon. And in this action, the ſaid rſula produced (what ſhe ſaid was) an original of the articles of greement, with the Engliſh judgment, and inſtrument executed pon the diſcharge of the reſpondent's bail.

Before any determination in this matter, the ſaid Urſula died; nd the appellant having adminiſtered to her, and alſo confirmed e ſaid debt in Scotland, revived the action againſt the reſpondnt in 1704. Various ſteps were afterwards taken in this ac-

tion, and in February 1708 it was remitted to the Lord Ordinary to make a ſtate thereof: the points then in queſtion before his lordſhip were,

1ſt, Whether the judgment obtained in England ſhould be taken as *res judicata*, and ſhould be admitted as a ſufficient proof of this debt without any other evidence.

2d, Whether the inſtrument for diſcharging the reſpondent's bail, and his declaration indorſed upon it, ſhould be deemed an homologation of the judgment; and

3d, Whether annual-rent ought to be paid for this debt *vel ex pacto vel ex lege*. This laſt point did not come under the appeal.

The Court, upon a report by the Lord Ordinary, on the 13th of July 1709, "Found that the aforeſaid declaration doth homologate and exclude all objections againſt the judgment;" to which they adhered on the 26th and 28th of July. But the reſpondent having preſented another petition, in which he contended that former deciſions of the Court were in his favour, and ſtated that the appellant's father had never ſigned the articles of copartnerſhip; the Court allowed a re-hearing, and afterwards, in June 1710, "found that the declaration granted by "the reſpondent did not homologate and exclude objections "againſt the judgment;" to which they adhered on the 13th of February 1711. And on the 3d of December 1713, the Court "ſuſtained the judgment of the Court of King's Bench, the appellant inſtructing that Goddard was copartner, and that Sir "John was caſhier and had intromiſſion to make him liable for "Goddard's proportion."

Sic in Journ. Entered, 1 June 1715.

The appeal was brought from "ſeveral interlocutors of the "Lords of Council and Seſſion of the day of June 1710, the "13th of February 1711, and 3d of December 1713."

Heads of the Appellant's Argument.

The judgment ought to be allowed to be a ſufficient proof of the matters now directed to be proved over again; and the rather ſince it appears from the judgment, that the reſpondent by demurring generally had admitted and confeſſed theſe very facts, *inter alia*, to be as they are ſet forth in the declaration, viz. That the appellant's father was co-partner, and that the reſpondent was caſhier of the ſaid cargo, and had received the proceeds of it: beſides which, by the articles of copartnerſhip produced and read at all the hearings, and admitted by the reſpondent to be his act and deed, it is manifeſt, that the appellant's father was copartner.

The inſtrument for diſcharging the reſpondent's bail, which is atteſted as a witneſs by himſelf, wherein he declared, that he was not then able to pay the ſaid debt; and his indorſement upon the ſame, whereby he agrees, that nothing contained in that inſtrument ſhould releaſe the ſaid judgment or preclude Mrs. Goddard from recovering the debt due to her thereon, are ſuch acknowledgments of the ſaid debt, and ſuch an eſtabliſhment of the judgment, and of the ſeveral material facts in the declaration

mentioned, on which the ſaid judgment is founded, as amount to a perfect homologation or confirmation of the ſame.

Heads of the Reſpondent's Argument.

The ſaid declaration ſigned by the reſpondent was not a formal or direct covenant or deed of conſent, nor can import a homologation of the judgment of the King's Bench; becauſe it was not made freely and voluntarily, but *metu carceris*, the reſpondent being then ſurrendered by his bail, as appears from the expreſs words of the releaſe, and being in the power of the ſaid Urſula Goddard and ready to be put in gaol; and by the conſtant practice of the law of Scotland, agreeably to the principles of the civil law, a deed made even directly confirming any judgment or covenant in ſuch a caſe, could have been of no force, unleſs the juſtice and equity of ſuch judgment otherwiſe appeared to the Court. It was upon repreſentation of former deciſions and a full argument on that ſubject, that the Court of Seſſion were brought to alter their firſt ſentiments, for "nihil conſenſui tam contra-"rium eſt quam vis atque metus; quem comprobare contra bo-"nos mores eſt. Ulpianus Lex, 116. de Reg. Juris."

As this deed was involuntary, ſo it was not at all to the purpoſe that the appellant contends for: The reſpondent's bail having ſurrendered, or at leaſt agreed to ſurrender him, they inſiſted to be releaſed, and this the ſaid Urſula agreed to, in conſideration of the payment of 5 ſhillings: but ſhe being anxious to reſerve to herſelf the benefit of the ſaid judgment againſt the reſpondent, ſhe obliged him to declare, that the releaſe of his bail was not intended to diſcharge the judgment or any advantage againſt the reſpondent for payment of the debt. The point in view was not to confirm the judgment, but to declare what was the intent of the releaſe.

The validity and equity of this judgment depends upon this point, amongſt others, viz. whether the ſaid Robert Goddard was a copartner with the reſpondent, and others, and this point the reſpondent diſputes, and ſays, that Robert Goddard never ſigned theſe articles: if this be the caſe, though a party may by homologation ſupply any defect of a deed which depends upon himſelf only, yet no deed of the reſpondent's could have made Robert Goddard a partner in the whole ſtock without conſent of the whole partners; and it was upon this ground, among others, that the Court pronounced the interlocutor of the 13th of February 1711.

There is no law nor precedent, binding or obliging, the ſovereign court of any country to put in execution the decree or ſentence of any court of another country; and in the year 1680, when the judgment of the King's Bench was given, as well as in the year 1700, when the action was commenced before the Court of Seſſion, the kingdom of Scotland was ſeparate from England as much as any other kingdom of Chriſtendom. Even now after the union, it remains ſtill equally diſtinct in all things that concern the laws of civil right, and the limits and extent of juriſdic-

tion by expreſs ſtipulation; the governing maxims, th *par in parem non habet imperium vel poteſtatem,* and *extra ter jus dicenti impune non paretur* muſt take place as much as e the judgment of the King's Bench can no more take Scotland, than thoſe of the Court of Seſſion can take England.

But even ſuppoſing the judgment of the King's Bench the ſame effect and force out of England, that the a contends it ought to have, yet the interlocutor of the 3d D 1713 is moſt juſt; for the appellant did not inſiſt only t judgment, but likewiſe upon a counterpart of the article partnerſhip which he produced. The whole cauſe was th him ſubmitted to the Court; and if the reſpondent had a to object to the ſaid Goddard's being a partner, the Cou to have received it. The appellant, even oftener tha prayed for leave to make further probation, and inſiſt his father was copartner, and that the reſpondent was caſ received his effects.

It makes no difference, that the articles were in rel Engliſh buſineſs, and executed in England by perſons there; becauſe, the objection in this caſe ariſes from the tion of juriſdiction, which is *juris publici:* And the only is, whether the judgment of the King's Bench does b Court of Seſſion to proceed, without enquiring into the againſt a perſon and his property in Scotland, which are u direction and protection of the law and juriſdiction o there.

Judgment, 30 Auguſt 1715. After hearing counſel, *It is ordered and adjudged, that petition and appeal be diſmiſſed this Houſe, and that the inte complained of in the ſaid appeal be affirmed.*

For Appellant, *Rob. Raymond. Sam. Mead.*
For Reſpondent, *David Dalrymple. J. Jekyll.*

Robert Middleton, Rector of St. Mary's in Colcheſter, - - - - - *Appellant*;
Lieutenant-Colonel John Balfour, - - *Reſpondent*.

Caſe 39.

2d *September* 1715.

Heritable and Moveable.—A father in 1641, upon his eldeſt ſon's marriage, ſettled an eſtate upon him and the heirs thereof, reſerving a power to burden: the ſon was infeft, and half the marriage-portion paid to the father; but the wife dying without iſſue, within year and day, the father granted a bond to the ſon to employ ſame for his benefit, or to reſtrict his power of burdening *pro tanto*; the eldeſt ſon alſo dying, the father ſettled the eſtate upon the ſecond ſon, who, after the father's death, granted heritable ſecurities with infeftment to creditors thereon in 1666, upon which apprifings were led in 1670. His ſon having taken up the ſucceſſion as heir to his uncle, inſtead of his father (the ſecond ſon); at the inſtance of creditors, the contract of marriage and infeftment were reduced by the Court of Seſſion, but with a clauſe, that the half of the marriage-portion which had been paid ſhould be a *real* burden upon the eſtate: this half was afterwards confirmed by the executor, and adjudication taken in 1680. In a competition between the perſon having right to the heritable bonds and infeftments in 1666, with apprifings thereon in 1670, and the perſon having right to the half of the marriage-portion, the Court having preferred the latter, the judgment is reverſed.

BY contract of marriage in April 1641, between Sir Robert Arnot, ſon of Sir James Arnot of Fairnie, and Elizabeth Bruce, daughter to George Bruce of Carnock, Sir James Arnot, in conſideration of the ſaid marriage between his ſon Sir Robert and the ſaid Elizabeth Bruce, and of 16,000 merks to be paid by the ſaid Bruce of Carnock, conveyed all his eſtate and lands of Fairnie to his ſon Sir Robert, and the children of the marriage by way of entail, reſerving his own life-rent in part thereof, and a power of burdening the ſaid eſtate with 16,000*l.* Scots, and upon this contract an inſtrument of ſaſine was taken. Mr. Bruce of Carnock, ſoon after the marriage, took effect, paid the ſum of 8000 merks, half of the ſaid 16,000 merks, to Sir James Arnot, the father: But Elizabeth Bruce died within year and day of her marriage without a living child, and the other half was not paid. Upon an agreement in January 1641-2, relative to this matter, between Sir James Arnot and Mr. Bruce, Sir James granted bond to Mr. Bruce of Carnock, that he would either employ the ſaid 8000 merks, for his, Sir Robert's benefit, or diminiſh the power he had of burdening the eſtate *pro tanto*.

Sir Robert Arnot died ſoon after, and his father re-entered to the enjoyment of the eſtate; and afterwards executed a ſettlement thereof to himſelf in life-rent, and after his deceaſe to James Arnot, his eldeſt ſon then living in fee.

Sir James Arnot and James his ſon having afterwards borrowed from Henry Wemyſs, the appellant's grandfather, the ſum of 4000 merk, did, by their bond dated 8th February 1650, bind themſelves, their heirs, &c. to pay the ſame with intereſt at Candlemas

dlemas 1651 to the ſaid Henry Wemyſs, and in caſe of his death, to Iſabel Wemyſs and Margaret Wemyſs, his daughters, equally between them. Sir James Arnot having died before the ſaid debt, or any part thereof, was paid, and the ſaid Henry Wemyſs being alſo dead, James Arnot the ſon, on the 24th of May 1666, granted two heritable bonds for ſecuring payment thereof, one of them to John Middleton (the appellant's father, who had married one of Henry Wemyſs's daughters), and Margaret his wife, and the other to the ſaid Iſabel Wemyſs. Theſe bonds ſeverally bore, that the parties, at the earneſt requeſt of the ſaid James Arnot, were willing to ſuperſede payment of their reſpective halfs of the ſaid debt and intereſt, each half then amounting to 2108 merks, and therefore the ſaid James Arnot granted to each of the parties an annual-rent of 130 merks 10 ſhillings and 8*d.* Scots to be iſſuing and payable out of all his ſaid eſtate at Lammas and Candlemas by equal portions, with a penalty in caſe of non-payment. Upon theſe two bonds the parties were ſeverally infeft. On the 13th of September 1670, Iſabel Wemyſs aſſigned to the appellant's father the ſaid heritable bond in her favour: And no part of the ſaid annual-rent being paid, the appellant's father and mother in their own right, and the appellant's father as aſſignee of the ſaid Iſabel Wemyſs, on the 25th of April 1671, obtained a decree of apriſing againſt the ſaid eſtate for the arrears of both the ſaid annual rents then amounting to 1508 merks.

The ſaid James Arnot died, leaving the eſtate much incumbered with debts, and was ſucceeded by his ſon James. This James, for the purpoſe of getting the eſtate free of theſe debts, ſerved himſelf heir in ſpecial to Sir Robert, his uncle, who had been infeft in the eſtate in virtue of the marriage-contract. And thereupon the Lord Burleigh, and other creditors of James the ſon, brought an action before the Court of Seſſion, to have the ſaid ſettlement of the eſtate upon Sir Robert by the marriage-contract reduced and voided upon this reaſon, that the eſtate being conveyed to Sir Robert by Sir James his father *intuitu matrimonii*, and that marriage being diſſolved within year and day without a living child thereof, the right fell, and the eſtate returned to the grantor. James the grandſon oppoſed this action; and it was contended, that if the eſtate returned to Sir James the grandfather, it ought to be with the burden of 8000 merks, part of Sir Robert's Lady's marriage portion, and which Sir James had obliged himſelf to employ for Sir Robert. The Court, in 1678, reduced the marriage-contract and conveyance of the eſtate to Sir Robert, with the burden of the ſum of 8000 merks to be paid to them who ſhould be found to have the beſt right thereto; declaring the foreſaid ſum of 8000 merks to be a real burden affecting the lands, and preferable to any debt or burden poſterior to Sir James's bond; and that the repreſentatives of the ſaid Sir Robert Arnot might adjudge the lands, and were preferable to all other creditors of the ſaid Sir James Arnot the father, or James the ſon poſterior to the bond.

George Arnot, third ſon of the ſaid Sir James, afterwards confirmed himſelf executor to his eldeſt brother Sir Robert; and

in

mpetition between him and James Arnot the grandſon and
t law, (Sir Robert's nephew), the Court of Seſſion, in
decreed the ſaid ſum of 8000 merks to belong to the exe-
And on the 11th of January 1683, George Arnot obtained
of adjudication of the ſaid lands as a ſecurity for the ſaid
8000 merks.
s debt of 8000 merks, and ſecurities of the ſame, were
ards acquired by the Lord Burleigh (who before had ſeveral
ngs and claims upon the eſtate); and he accordingly entered
poſſeſſion of the eſtate. On the 10th of December 1684,
Burleigh conveyed all the appriſings, heritable ſecurities,
cations and other ſecurities he had upon the eſtate to the re-
nt who entered to and poſſeſſed the eſtate by virtue thereof.
father of the appellant having died, he became entitled to
d two annual rents which had been granted to his father
other, and to Iſabel Wemyſs his aunt, which, with the
thereof, amounted to a great ſum of money: And in
near 35 years ſince the Lord Burleigh and the reſpondent
ntered to the poſſeſſion of the ſaid eſtate, he brought his
againſt the reſpondent before the Court of Seſſion, in order
e the poſſeſſion of the eſtate granted to him for ſatisfaction
ſaid debts, contending that the claims of the reſpondent
ully ſatisfied by receipt of the rents. And the reſpondent
it an action of ranking and ſale againſt the appellant and
her creditors upon the eſtate, that their reſpective claims
be examined, the eſtate brought to a ſale, and the price
d towards diſcharging the prior incumbrances.
ſe actions came to be heard together, and it came to be a
on (which is the ſubject of the preſent appeal), whether the
ebt of 8000 merks, to which the reſpondent had acquired
and which by decree of the Court of Seſſion in 1678 was
to be a real burden upon the ſaid eſtate, and preferable to
its contracted by James the ſon, and for which an adjudi-
was obtained in 1683; or the debt claimed by the appellant,
referable upon the eſtate. The appellant made an objection,
hough the reſpondent contended that this debt of 8000
was a real one, yet his only title to it was through an exe-
Parties were heard before the Lord Ordinary, and his
p, on the 5th of February 1714, "Repelled the appellant's
ction againſt the reſpondent's title to the bond and ſum
ein; and found that George Arnot was *habili modo* veſted
he right thereof, the ſaid decree of reduction bearing that
to be only a real burden upon the ſubject, ſo that as to
creditor it continued moveable: And found, that notwith-
ding the adjudication at George Arnot's inſtance in 1683
poſterior to the appellant's appriſing, yet the ſame muſt be
wn back *ad ſuam cauſam*, viz. the bond granted by Sir James
ot to Bruce of Carnock for the behoof of Sir Robert
ot, his ſon-in-law, of the 8000 merks advanced by Carnock
he ſaid Sir James as a part of the portion with his daughter,
he terms of the contract of marriage: Therefore and in
"regard

" regard the decreet of reduction of Sir Robert's contract
" marriage, and infeftment bears to be with an expreſs burde
" and condition of paying the ſum contained in the ſaid bon
" which muſt be underſtood *cum omni cauſa*, preferred the reſpo
" dent by virtue of the ſaid adjudication, for the ſaid princip
" ſum of 8000 merks, and intereſt thereof, ſince leading of th
" ſaid adjudication and in time coming upon the lands therei
" contained, and price thereof in caſe of a ſale, and that pri
" to the appriſing founded on by the appellant." The appella
gave in a repreſentation, and after anſwers for the reſpondent, th
Lord Ordinary, on the 19th of February 1714, " adhered to th
" ſaid former interlocutor." The appellant afterwards re
claimed, and the reſpondent having anſwered the Court on th
11th of June 1714, " adhered to the Lord Ordinary's interlocu
" tors as to the 8000 merks principal money, but remitted to th
" Lord Ordinary to have parties procurators as to the intere
" ſince the decreet of adjudication led for the ſaid ſum, and t
" determine or report as he ſhould ſee juſt." A ſecond reclaimin
petition was given in for the appellant, and anſwers for the re
ſpondent, the Court, on the 30th of June 1714, " adhered t
" their former interlocutor and refuſed the deſire of the petition.

Entered, 29 June 1715.

The appeal was brought from " the interlocutory ſentences,
" decrees of the Lord Polwarth the Ordinary in the cauſe of th
" 5th and 19th days of February 1714, and from ſo much of th
" interlocutors of the Lords of Seſſion of the 11th and 30
" days of June 1714, as affirms theſe interlocutors of the 5
" and 19th of February."

Heads of the Appellant's Argument.

Though the bond founded on by the reſpondent was prior i
date to the heritable bonds on which the appellant claims; ye
the ſaid bond being only perſonal, it could not, unleſs appriſin
had been obtained prior to the date of the ſaid heritable bonds
preclude the appellant from the enjoyment of the ſaid annual
rents, which, by the heritable bonds and infeftments thereon
were real rights immediately affecting the ſaid eſtate. Even i
they had not been real rights, affecting the ſaid eſtate, yet th
reſpondent's adjudication in 1683, being more than ten years po
terior to the decree of appriſings obtained by the appellant
father in 1671, it could not bar the appellant's right, for by th
unqueſtionable law of Scotland ſuch appriſings after 10 years gi
an abſolute right to the eſtate ſo appriſed to the excluſion of a
ſubſequent rights.

The bond granted by the ſaid Sir James Arnot for the 80c
merks for the uſe of Sir Robert his ſon, when his marriage ha
pened to be diſſolved, was but a perſonal obligation: It was grant
at the deſire of Bruce of Carnock to whom the money ought
have been repaid, but he being willing to give it to his ſon-in-la
took it for his uſe; and this bond did not affect the eſtate till t
adjudication was had thereon in 1683. Before this time the her
able bonds in the perſon of the appellant had been granted, a
infe

infeftment taken thereon, and the appellant's father had uſed his real execution by appriſing againſt the ſame. That the bond for 8000 merks was merely perſonal, appears further from the aſſignment thereof by George Arnot the executor of Sir Robert, under which the reſpondent claims: For if it had been a real right to affect the ſaid eſtate, it would have belonged to Sir Robert's heir and not to his executor, and of conſequence the ſaid George Arnot could not have had a right thereto, nor made a good grant thereof.

With regard to the decree of the Court of Seſſion in 1678, nothing therein could alter the nature of the thing ſo as to make that bond a *real*, which was only a *perſonal right*; nor could this this decree affect the appellant, ſince neither his father nor he were parties called or appearing thereto. Nor ought this decree to be conſtrued otherwiſe, than that the ſaid eſtate would be ſubject to this debt, after the appellant's and other prior incumbrances were paid. But, however, nothing in the decree, which was poſterior both to the heritable bonds and to the decree of appriſing under which the appellant claims, and made between other parties, can prejudice the appellant's right; and his father had great reaſon to think himſelf ſafe, when no real incumbrance appeared on the ſaid eſtate from the *public records*, which are a great ſecurity by the law of Scotland, and would be wholly fruſtrated if in this point the reſpondent ſhould prevail.

Heads of the Reſpondent's Argument.

The obligation for the payment of the 8000 merks granted by Sir James the grandfather, did never affect or charge the fee in Sir Robert's perſon; but upon Sir Robert's death it affected and charged the reverſion of the fee to the grandfather, and thoſe claiming under him, ſo that they could not enjoy the eſtate, but charged with this ſum.

Upon the diſſolution of the marriage, all things behoved to remain as ſecurities and pledges for one another, till there was a full performance by both parties of the marriage-contract; and if it was a real charge upon the eſtate it muſt be preferred to the appellant's, and all other debts contracted afterwards.

The rule is not univerſal, that all real rights are to be found upon record. For there are ſeveral real rights conſtituted by infeftments, where the conditions are not expreſsly mentioned: For, a wife infeft for a jointure, if the marriage diſſolve within year and day, will retain her jointure till her portion be repaid, though there be no ſuch quality in the infeftment: Excambion is likewiſe a real burden without infeftment, which indeed comes very near the preſent caſe. Nor can this be any uncertainty to creditors becauſe not recorded; for the infeftment to Sir Robert was recorded, and no body would purchaſe the eſtate or lend money upon it, without knowing how Sir Robert was diveſted of that eſtate, whereby they would know that this debt was a charge upon the ſame.

The

The appellant made objection, that if this were a real burden upon the eſtate, it could not go to the executor. But the intereſt of all real debts goes to executors, and ſo do annuities, and yet they are real burdens and really ſecured: And the Court of Seſſion in 1680, after finding this debt of 8000 merks to be a real burden, decreed the right thereof to the executor; and it is *jus tertii* to the appellant to make this objection, ſince the heir does not queſtion the conveyance.

This debt being by the Court of Seſſion in 1678 found to be a real debt upon the eſtate, preferable to all the debts of James the ſon, Lord Burleigh, who was a conſiderable creditor, was neceſſarily obliged, in order to ſecure himſelf, to purchaſe this debt. It would be to render the decrees of the Court of Seſſion very precarious (which are at preſent looked upon to be the beſt title for a purchaſe) if they were to be overturned, after almoſt forty years poſſeſſion under them.

Journal, 2 September 1715.

After hearing counſel, *It is ordered and adjudged that the ſaid interlocutors of the 5th and 19th of February* 1714, *and ſo much of the ſaid interlocutors of the 11th and 30th of June* 1714, *as affirms thoſe interlocutors of the 5th and 19th of February be reverſed; and that the decree of appriſing of the 25th of April* 1671, *obtained by the appellant's father, and the appellant's demand in reſpect of the annuities granted by the deeds of the 24th of May* 1666, *ought to have preference of and be ſatisfied out of the eſtate in queſtion before the* 8000 *merks claimed by the reſpondent.*

For Appellant, *Spencer Cowper. Rob. Raymond.*
For Reſpondent, *J. Jekyll. Will. Hamilton.*

Caſe 40. Fountainhall, 27 March 1707. Forbes, 24 July 1713.

James Hamilton of Dalziel Eſq. - - *Appellant;*
The Principal, Maſters, and Profeſſors of the Univerſity of Glaſgow, - - *Reſpondents.*

9th *May* 1716.

Superior and Vaſſal.—*Act of Parliament* 1469, c. 36.—An univerſity having acquired right to an adjudication of lands, held in ward, for a debt due to them, the Court found that the ſuperior muſt enter the univerſity, or pay the debt to the extent of the value of the lands: but upon appeal the judgment is reverſed; and it is ordered, that the ſuperior ſhould admit ſuch proper perſons for vaſſal as the univerſity ſhould nominate.

Bona fide Poſſeſſion.—The ſuperior, notwithſtanding the reverſal, is obliged to account for the rents ſince the charter was offered to him by the univerſity, he having deduction of his caſualties as if the old vaſſal then entered.

Coſts and Expences.—Expences of the Court below, and 30*l.* coſts of appeal, given to the *appellant*.

ON the 9th of June 1687, Elizabeth Herbertſon, widow, obtained a decreet of adjudication of the lands of Shields and Burngrains, belonging to her creditor Mungo Niſbet, who held theſe lands of the appellant in Ward holding. Mrs. Herbertſon afte

afterwards gave the appellant a charge to enter her as his vaſſal, ut ſhe never did enter in that capacity, and the appellant, in December 1696, obtained a decree of declarator of non-entry gainſt her. In May 1697, Mrs. Herbertſon being debtor to the eſpondents in certain ſums of money, for their payment and isfaction aſſigned over to them her ſaid debt due by Mungo bet, and alſo conveyed to them the ſaid adjudication obtained r her over the lands of Shields and Burngrains.

In July following the reſpondents tendered to the appellant as perior a year's rent and a charter to be executed by him, to mit the reſpondents as his vaſſals in the premiſes; but the ap-llant refuſed to admit the reſpondents, alleging that he was not bliged to admit an univerſity as his vaſſals, becauſe he would ereby be deprived of his caſualties of entry, non-entry, and her caſualties incident to ward-holding.

The reſpondents in 1707 brought an action before the Court of ſſion to compel the appellant to receive them as his vaſſals; and he cauſe being heard before the Lord Ordinary, his lordſhip, on he 25th of March 1707, "found that the appellant was not "obliged to enter the reſpondents as his vaſſals."

This action was not further proceeded in till 1713, and at a hearing of the cauſe on the 16th of February that year, the reſpon-dents inſiſted upon the act of parliament 1469. c. 36. that the 1469, c. 36.
ppellant was obliged either to enter the reſpondents as his vaſſals, "to pay the debt due to them. The Court, on the 24th of July 1713, "found that the appellant the ſuperior muſt either enter "the univerſity of Glaſgow, or pay the debt due to them to the "value of the lands adjudged, as the ſaid value ſhould be deter-"mined by the Lords upon a probation thereof; and found that "the ſaid reſpondents muſt transfer their right and debt to him "upon his paying the value of the ſaid lands, with abſolute war-"randice for the ſum they received, reſerving always their right "to them againſt the common debtor, in ſo far as they ſhould "not be ſatisfied by the appellant in regard the debt due to the "reſpondents was more than the value of the lands, and found "that the appellant muſt be accountable for his intromiſſions with "the rents of the ſaid lands, or intereſt of the value thereof, in "his option from their offer of a charter and year's rent to him, "and remitted it to the Lord Ordinary in the cauſe to call and "hear the parties, procurators, and apply the interlocutor, and "determine or report."

Before the Lord Ordinary the appellant made ſeveral objections to the offer of the charter made by the reſpondents to him; and his lordſhip, on the 28th of the ſaid month of July, "found the "appellant accountable for the rents or intereſt of the value of "the lands from July 1697, the time the charter was offered to "him," and granted commiſſion to both parties to examine wit-neſſes as to the value of the premiſes.

The appellant preſented a reclaiming petition to the Court, omplaining particularly of that part of the interlocutor obliging im to account for the profits ſince he was in poſſeſſion, by virtue of

of a decreet of non-entry, and contending that he was a bon fide poſſeſſor till the univerſity ſhould obtain judgment that th appellant was obliged to receive them as his vaſſals; and he like wiſe made ſome objections to the charter offered him by the re ſpondents. (*a*) After anſwers for the reſpondents, the Court, o the 31ſt July 1713, "adhered to their former interlocutor, an "refuſed the deſire of the ſaid petition, reſerving to the appel "lant his objections againſt the reſpondents' charter offered t "him." The appellant preſented another reclaiming petitio againſt theſe interlocutors, and praying that his objections againſ the charge given him by the reſpondents to receive them as his vaſſals, might likewiſe be reſerved to him. After anſwers, the Court, on the 18th of November 1713, "adhered to their "former and the ſaid Lord Ordinary's interlocutors, and refuſed "the deſire of the petition." The appellant proteſted for remedi of law againſt the interlocutors already pronounced; but his appeal was not entered in the Houſe of Lords till other poſterior interlocutors were pronounced.

A proof was afterwards made of the rental and value of the ſaid lands; and after conſidering the proof, the Court, on the 9th of July 1715, "found that the ſaid lands held ward of the ap- "pellant, and that the ſame were worth 16 years purchaſe; and "that the value and price of the ſaid lands extended after deduc- "tion of the teind to 1744*l.* 14*s.* 4*d.* Scots money; and found "that the appellant ought to make his election whether or not "he would accept of the ſaid lands at the value and price afore- "ſaid, (the univerſity of Glaſgow transferring their right to him "with abſolute warrandice for the ſaid price and value), and pay "to the ſaid univerſity the ſaid price, or enter and receive the "ſaid univerſity as his vaſſal upon their adjudication, upon pay- "ment to him of a year's rent of the ſaid lands."

The appellant (reſerving a liberty of appealing) by his counſel made his election to purchaſe the lands; and thereupon the Court (*b*) "decerned the appellant to pay to the reſpondents 1744*l.* "14*s.* 4*d.* Scots, with intereſt, from the 15th of July 1697, the "date of the offer of the charter, the reſpondents tranſmitting "their right to the appellant." The appellant petitioned againſt this interlocutor, as being thereby deprived of an opportunity of making his objections againſt the charter offered to him in terms of the interlocutor 31ſt July 1713; and he ſtated that though he had petitioned againſt the other parts of that interlocutor, and inſiſted that he might be at liberty to except to the charge given him to enter the reſpondents his vaſſals, as well as to the charter offered to him, which petition the Court, on the 18th of November 1713, had refuſed and adhered to their former interlocutor; yet ſo far was that from taking away the reſervation, that the interlocutor whereby it was given was affirmed; and the appellant therefore prayed, that he might be heard as to theſe objections

(*a*) It does not appear from the Appeal Caſes what theſe objections were.

(*b*) No date appears to this; and except it formed part of the interlocutor 9 July 171 it does not appear to be appealed from.

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he Court, on the 28th July 1715, " adhered to their former interlocutor, and refuſed the deſire of the petition."

The appeal was brought from " an interlocutor of the Lords of Seſſion of the 24th of July 1713, and from an interlocutor of the Lord Polwarth, Ordinary in the cauſe, of the 28th of the ſame month, and from that part of the interlocutor of the Lords of Seſſion of the 31ſt of the ſame month affirming the ſaid former interlocutors and refuſing the deſire of the petitioner's ſupplication; and likewiſe from the interlocutors of the ſaid Lords of the 18th of November following, and of the 9th and 28th of July 1715." Entered, 11 Aug. 1715.

Heads of the Appellant's Argument.

The lands in queſtion hold ward of the appellant, and he is entitled to all the caſualties of ſuch tenure; particularly ward, relief, and marriage, which are part of the appellant's property. It cannot, then, be looked upon but as a very great hardſhip to deprive him of all theſe caſualties (which were the only conſideration for the original grant of the ſaid lands) without his conſent; but ſhould the reſpondents prevail, the appellant muſt loſe all theſe caſualties, ſince an univerſity or corporation can never marry or be under wardſhip.

However general the words of the act of parliament be, yet as there never was any inſtance of a ſuperior's having been compelled to receive an univerſity or corporation for his vaſſal, yet the purport of the act, as it is humbly apprehended, can only be intended to compel a ſuperior to receive the creditor as his vaſſal, ſuppoſing he were of the ſame nature or condition as the former vaſſal. For it cannot be reaſonably thought that the legiſlature intended to put it in the power of a vaſſal to alter the tenure, and to deprive and diſappoint a ſuperior of his caſualties; and yet upon the foundation of this decree it will be in the power of every vaſſal to aſſign to a corporation whereby a ſuperior will entirely loſe his caſualties.

The reſpondents have an eaſy and ſafe way to prevent any prejudice to themſelves or being deprived of their juſt demand as creditors; for they may convey their right to a third perſon in truſt for them, and then the appellant, as ſuperior, will enter him as his vaſſal. And ſince, by this method, the reſpondents may be ſafe as to their demands, and the appellant ſtill be entitled to his caſualties, it would be a great hardſhip to oblige the appellant to do any thing ſo much to his prejudice as to forfeit his caſualties. Though the appellant ſhould be obliged to receive the reſpondents as his vaſſal, yet it is conceived to be unreaſonable to make him accountable either for the rents of the lands, or the intereſt of the value thereof, becauſe the appellant was certainly *bona fide* poſſeſſor of theſe lands; he had decree of declarator of non-entry againſt thoſe under whom the reſpondents claim, and the poſſeſſion thereof accreed to him. He had likewiſe the Lord Ordinary's interlocutor in his favour when this cauſe came firſt to be heard, and if the reſpondents

reſpondents ſuffered any inconvenience, it was their own fa not commencing and proſecuting their action ſooner.

Though the appellant were accountable for profits, that only be from the offer made of a charter from the reſpon but that not being done in a regular manner, nor according forms preſcribed for that purpoſe, that offer muſt be looke as void, and conſequently the appellant not chargeable w profits of the ſaid lands.

Heads of the Reſpondents' Argument.

The words of the act 1469, c. 36. are, "And alſo the ov "ſall receive the creditour or any uther buyer, tennent t "pay—and to the over-lord a yeire's maill as the land is ſet "time, and failzieing thereof, that he take the ſaid land ti "ſelf, and undergang the debtes." This act makes no r of diſtinction what ſort of creditors the ſuperiors muſt r whether a body corporate or an individual; ſo that the law indefinite and general, making no exception, the applicatio be ſo likewiſe, eſpecially ſeeing all corporate bodies, and p larly univerſities, who have all the favour the law can allo purchaſe and contract debts. But if they cannot ſecure thei and purchaſes in the ſame manner that the law allows t creditors, they would be entirely deprived of the benefit dealings or improving their ſtock; becauſe, by the law o land, lands and ſecurities upon lands cannot be effectual veyed without ſaſine, which the ſuperior muſt always give caſe of adjudications; ſo that to allow the ſuperior the lib refuſing, is in effect to deny the benefit of real ſecurity to porated bodies on their debtor's lands. And as to the pre inconveniences that might happen to a ſuperior, by an univ being received as a vaſſal, they are very little to be regarde although they were ſuch as ſtated, yet the act of parliamen general, it muſt take place, and inconveniences in certain cular caſes muſt always yield to a more univerſal good: ſuperiors have got by the law a recompence, which is a ful rent, and which is thought equivalent for the exchange vaſſal.

The appellant can ſuſtain no loſs by this, for long before t of a charter, and ever ſince he has been in poſſeſſion of all th and profits of the ſaid eſtate, and by the interlocutors a from he is decreed to pay no greater price than 16 years' pu which is very moderate, and it was the appellant's own pa choice, rather to pay that price than to quit the property lands and retain the ſuperiority only. Beſides, it is moſt able that the appellant ſhould be obliged either to be acco for his intromiſſions, or the value of the lands and intere the ſaid 5th of July 1697, becauſe he received the rents a fits *ſine titulo*; and his poſſeſſion was a plain uſurpation u vaſſal, for the ſuperior is only entitled to the full rents du vaſſal's wilful non-entry. But ever ſince the ſaid 5th

697 the vaſſal has not been wilfully in non-entry, that being the ſame of the univerſity's offering a charter and a year's rent to the appellant to enter them as his vaſſals. With this he ought in law to have complied, whereby the lands would have been full; and they muſt be held to be as to the appellant, agreeably to the rules of the civil law. "In omnibus cauſis pro facto accipitur id, in quo per alium moræ fit quo minus fiat." Digeſt. de reg. juris. 39. And "In jure civili receptum eſt quotiens per eum, cujus intereſt, conditionem non implere, fiat, quominus impleatur, perinde haberi, ac ſi impleta conditio fuiſſet." Ibid. 161. Digeſt. l. 50. tit. 17. l. e Reg. Jur. 39 & 161.

As to the pretence of the charter's being irregular, that is entirely groundleſs, the ſame being in the preciſe words of the charters granted by the appellant's predeceſſors of the ſaid lands to the former vaſſals. And although the appellant made ſeveral objections to the ſaid charter ſo offered by the univerſity, and though theſe objections were reſerved to him to be proved; yet upon the appellant's application to the Court in relation thereto, and the univerſity's anſwer, theſe objections were fully cleared, as appears by the interlocutor of the 18th November 1713, as well as by all the ſubſequent interlocutors made in this cauſe. The reſervation of theſe objections therefore cannot be conſtrued to entitle the appellant to the property of all the rents and profits of the eſtate received by him, ſince theſe objections have been ſince over-ruled by what the Court did afterwards.

After hearing counſel, *It is ordered and adjudged, that the ſeveral interlocutors complained of in the ſaid appeal be reverſed; and it is further ordered and adjudged, that the appellant admit ſuch proper perſon for tenant as the reſpondents ſhall nominate, and that the appellant do account for the profits of the lands of Shields and others mentioned in the ſaid appeal, which he received or might have received without his wilful default, from the time the reſpondents offered the charter in the year* 1697, *deducting thereout the year's rent due for ſuch admiſſion and the appellant's coſts in the court below, and alſo* 30l. *for the appellant's coſts of this appeal; and further, that the appellant have allowance for all ſuch caſualties as have* (been) *incurred* (if any) *ſuppoſing Mrs. Herbertſon had been admitted vaſſal in the ſaid lands at the time of the offer of the aforeſaid charter in the year* 1697, *and the ſaid Court of Seſſion is hereby ordered to cauſe the ſaid account to be taken, and full coſts to be aſſeſſed ſuſtained by the appellant in the court below.* Judgment, 9 May 1715.

For Appellant,	*Sam. Mead.*	*Will. Hamilton.*
For Reſpondent,	*David Dalrymple.*	*Thomas Lutwyche.*

This caſe is in ſeveral reſpects worthy of particular obſervation; the judgment here reverſed ſo favourably for the appellant, as to allow him expences of the court below and coſts of appeal, is founded on in the Dictionary, vol. 2. p. 408. *Superior and Vaſſal*; and by Bankton, b. 2. tit. 4. § 11. It appears deciſive

of the point, that a ſuperior is not obliged to receive an univerſity adjudger as his vaſſal.

With regard to the collateral point of law, whether, in the caſe of an univerſity or corporation diſponee a ſuperior would be obliged to receive or not, Bankton ſtates, that no deciſion has been given; and he inclines to think that the act 20 Geo. 2. c. 5. as it contains no exception with regard to univerſities or corporations, would oblige the ſuperior to receive them. Erſkine, however, b. 2. tit. 7. § 7. inclines to the oppoſite opinion; and indeed the act laſt mentioned does not appear ſo ſtrong in favour of the univerſity or corporation diſponee, as the act 1469, c. 36. is in favour of the adjudger.

A ſimilar deciſion to that here reverſed, is given by Dalrymple 11 December 1712, Maſter of Church and Bridge Work of Aberdeen, againſt the King's College of Aberdeen, where the deciſion of the Court of Seſſion in the preſent caſe is alſo mentioned.

Caſe 41. David Gregory of Kinnairdy, - - *Appellant*;
James Anderſon Grazier in Aberdeen, - *Reſpondent.*

24th *May* 1716.

Donatio inter virumet Uxorem.—During the ſubſiſtence of a marriage a wife and her ſiſter, who have an equal right to a bond, convey the ſame to the huſband. He afterwards makes his will, appointing his wife executrix and univerſal legatee, for behoof of the grandchildren. After the death of the huſband, the grant formerly made by her to him was not revocable as a *donatio inter virum et uxorem.*

Preſcription—The preſcription of 40 years not to be counted, from the date of an aſſignment of a bond, but from the time of receiving the money thereon.

Onerous cauſe.—An aſſignment of a bond, bearing to be for onerous cauſe, from the circumſtances of parties as executrix and truſtee, found not to prove the onerous cauſe of the aſſignment in a queſtion near 50 years from the date thereof.

Truſt.—A diſcharge granted by an executrix to a manager for her under a will, who had a ſalary, of all his receipts and intromiſſions, in general terms, was not ſufficient to diſcharge him from the intromiſſion with a bond, which the deceaſed diſponed to the widow, his executrix, for the good of his grandchildren.

Coſts—30*l.* given againſt the appellant.

HUGH FRASER of Eaſtertyre, and Thomas Fraſer of Strichen, as his cautioner, being indebted by bond in the ſum of 1100*l.* Scots to Patrick Dyvie; the ſame was afterwards aſſigned to Dr. William Guild, Principal of the college of Aberdeen. Dr. Guild dying inteſtate, and without children, his ſiſter Chriſtian was confirmed his executrix, who with her ſiſter Margaret, in Auguſt 1661, aſſigned that bond to Thomas Cuſhney, the ſaid Chriſtian's huſband.

Thomas Cuſhney by his will and teſtament, in 1664, appointed his wife Chriſtian his executrix and univerſal legatrix of all his eſtate

eſtate real and perſonal, in truſt for the reſpondent, and Thomas his brother, the teſtator's grandchildren by Jean Cuſhney his only child; ordaining his ſaid wife to give up an inventory of his eſtate, and to employ the ſame for the payment of his debts, and the good and welfare of his grandchildren; giving his wife only a life-rent out of his ſaid eſtate; and he appointed the appellant and two other perſons overſeers, and ordered his wife and grandchildren to pay 50 merks Scots to each of them yearly for their pains and trouble. This will and teſtament was alſo ſubſcribed by Chriſtian the wife of Thomas Cuſhney and Jean the daughter, in token of their aſſent thereto. After Cuſhney's death, the appellant purſuant to the truſt and during the widow's lifetime, received the produce and profits of the eſtate of the deceaſed, and accounted to her for the ſame.

In 1666, Chriſtian the widow executed an aſſignation of the ſaid bond for 1000*l.* Scots due by Fraſer of Eaſtertyre and Fraſer of Strichen, the nature and object of which are differently ſtated by the parties. The appellant mentions, that he being creditor to the ſaid Thomas Cuſhney, and alſo to his ſaid executrix, ſhe for payment of what was ſo due to the appellant aſſigned the ſaid bond to him, reciting the ſame to be for an onerous cauſe. The reſpondent, on the other hand, ſtates, that Chriſtian the widow was then very old and infirm, and that ſhe executed the ſaid aſſignation (ignorantly thinking ſhe had a title to do ſo) and left in it a blank, with intention to fill it up with the name of the reſpondent (who was then under age,) or with the name of ſome other perſon in truſt for him, in order, as ſhe thought, to ſave him expences afterwards: and that after the death of Chriſtian, the appellant continuing to direct the reſpondent in his affairs, took all the reſpondent's papers into his cuſtody, and put his own name in the blank of the aforeſaid aſſignation.

An appriſing was after the date of the aſſignation obtained againſt the debtor's eſtate, in name of Chriſtian the widow: in 1667, the appellant gave him a charge of payment on the bond, but it was not till 1682, that the appellant received payment of it.

The reſpondent having confirmed himſelf executor to Thomas Cuſhney his grandfather, in 1711 brought an action before the Court of Seſſion, of count and reckoning againſt the appellant as overſeer under Cuſhney's will, in which he charged the appellant with ſundry articles as received by him, and among others, with the contents of the ſaid bond for 1000*l.* Scots with intereſt received by the appellant.

After ſundry proceedings in this action, the Court, on the 10th of June 1715, "Found it proved that the appellant had received "the ſum in the ſaid bond, and was accountable for the ſame; "but not for the other articles claimed." And to this interlocutor the Court adhered on the 24th of the ſaid month of June.

The appellant then contended that no truſt appeared in the ſaid aſſignation; on the contrary, it was mentioned to be for an onerous cauſe: but, though there had been a truſt, it did not appear

that the reſpondent had right to the whole, ſince he had a brother Thomas Anderſon, who was entitled to a moiety: and, though there could have been any claim or demand by the reſpondent yet the ſame was preſcribed, the aſſignation being dated in 1666 and no action commenced till 40 years after. The Court, on the 8th of July 1715, "found that Thomas Cuſhney had right and "title to the whole debt in controverſy, and that the reſpondent "and his brother Thomas had right and title thereto from Cuſh "ney; and therefore the reſpondent had good title to the half "thereof, and remitted to the Lord Ordinary to hear parties "procurators on the reſpondent's title to the other half thereof "which belonged to Thomas Anderſon; and alſo to hear parties "on the onerous cauſe of the diſpoſition in favour of the ap "pellant; but repelled the objection and allegeance of pre- "ſcription."

The appellant then ſtated that he had paid ſeveral debts upon the reſpondent's account, which would more than compenſate any demands againſt him; and the cauſe being pleaded before the Lord Ordinary, his lordſhip, on the 26th of July 1715, "found "that Thomas Cuſhney had right to the haill ſums in Strichen's "bond, and repelled the objection againſt the libel, and ſuſtained "the defence, that the appellant had paid a debt for the reſpon- "dent or his grandfather to *Forbes of New* relevant to compenſe "*pro tanto* and to be proved *ſcripto*, and granted diligence for "proving the ſame." And upon a reclaiming petition againſt the firſt part of this interlocutor, the Court, on the 30th of the ſaid month of July "decerned againſt the appellant for the ſur- "plus of Strichen's money over and above what was alleged to "have been paid to *New*, and ordained the ſurplus to be liqui- "dated."

The appellant afterwards contended that the ſaid truſt, if any was, had been diſcharged; and he founded upon a diſcharge, dated the 4th of Auguſt 1670, executed in his favour by Chriſtian as executrix to Thomas Cuſhney, reciting the appellant's faithful ſervices to her in her affairs, and that he had made a juſt account with her; and therefore ſhe diſcharged the appellant of all his receipts and intromiſſions and of all others entruſted to him preceding the date thereof, diſpenſing with the generality thereof as if every particular were therein inſerted: and he likewiſe contended that the aſſignation by Chriſtian to her huſband during the marriage was void and revoked by the poſterior aſſignation to the appellant. The Court, on the 21ſt of December 1715, "Found that Chriſtian Guild having ratified her huſband's teſ- "tament after diſſolution of the marriage could not revoke the "diſpoſition made by her to her huſband in ſo far as concerns "her intereſt in the ſum due by Tyre and Strichen, and that the "appellant being by Thomas Cuſhney's teſtament overſeer both "to his relict and alſo to the reſpondent, that the narrative of the "relict's aſſignation to the appellant could not prove the ſame "to have been granted for an onerous cauſe in prejudice of "the reſpondent: and that the general clauſe in the diſ-

"charg

" charge by the relict to the appellant does not extend to this " ſubject."

The appellant having brought no proof of the payment to Forbes of New, conform to the interlocutor 26th July 1715, the Lord Ordinary, on the 10th of January 1715-16, circumduced the term againſt him, and decerned for principal, intereſt, and penalty, in terms of the libel. The appellant having reclaimed, the Court, on the 9th of February 1716, " Aſſoilzied " the appellant from the penalty in Strichen's bond, and allowed " the decreet pronounced by the Lord Ordinary the 10th of Ja- " nuary to be extracted for the half of the other ſums there de- " cerned for, but as to the other half granted diligence till " the day of June next to the appellant, for recovering " inſtructions of his compenſation by the payment to *Forbes of* " *New*, and for recovering the grounds of compenſation, whereby " the half of the ſums alleged to belong to the reſpondents' " brother Thomas Anderſon is pretended to be compenſed, " reſerving *contra producenda*." The appellant afterwards preſented a repreſentation to the Lord Ordinary, which was refuſed on the 28th of February, and a reclaiming petition to the Court, which was alſo refuſed on the 29th of the ſame month.

The appeal was brought from " an interlocutor of the Lords of " Seſſion of the 10th of June 1715, and the affirmance thereof " the 24th of the ſame month, and alſo of an interlocutor of " the ſaid Lords the 8th of July following, and likewiſe " from an interlocutor of the Lord Fountainhall Ordinary " in the cauſe of the 26th of the ſaid month, and of an interlo- " cutor of the Lords of Seſſion of the 30th of the ſame month, " and of an interlocutor of the 21ſt December following, and " of another interlocutor of the ſaid Lord Ordinary the 10th of " January 1716, and of an interlocutor of the Lords of Seſſion " the 9th of February 1716, and from an interlocutor of the " ſaid Lord Ordinary of the 28th of the ſame month, and alſo " from an interlocutor of the Lords of Seſſion of the 29th of the " ſame month." Entered 14 March 1715-16

Heads of the Appellant's Argument.

The reſpondent has no title to the bond in queſtion ſince he claims it by a deed from a wife to her huſband during marriage, which by law is void.

Though the reſpondent had any title, yet that is preſcribed by the act of parliament 1469. c. 28.; for the aſſignment of the bond to the appellant is in 1666, and no action was ever commenced againſt him for it till 1711, which is more than 40 years, in which time all actions by the law of Scotland are barred. 1469, c. 28.

Though the action were not barred, yet the very deed of aſſignment of the bond to the appellant bears the ſame to be for an onerous cauſe, or valuable conſideration, and therefore it is the greateſt hardſhip in the world to oblige the appellant, now almoſt 50 years after the date of the aſſignment, to condeſcend upon

and prove the particular onerous cauſe or valuable conſideratio for which the ſame was granted; for it ought to be preſumed bot from the deed itſelf, and from the length of time that there wa a valuable conſideration.

Though the ſaid bond had been aſſigned only in truſt, yet tha truſt is preſumed to have been executed, and the ſame accounte for; ſince in Auguſt 1670, four years after the ſaid aſſignmen the executrix of Cuſhney, under whom the reſpondent claim granted a general diſcharge to the appellant of all his receipt and of all things entruſted to him, which certainly at ſuch a lengt of time is to be preſumed to include this aſſignment.

Heads of the Reſpondent's Argument.

With regard to the preſcription, the reſpondent claims on ſuch ſums as the appellant, his truſtee, has received within the 40 years; for he received payment of the foreſaid bond in 168 (as appears by the appellant's releaſe to the debtors) which is n 40 years ago.

Cuſhney's widow could not convey the ſaid bond to the appe lant, ſhe and her ſiſter having conveyed it before to her huſbar in 1661, to which the appellant is a ſubſcribing witneſs; and r ceipts and vouchers under the appellant's hand were produced i court, to prove that he acted as truſtee for the widow and gran children according to the will.

By Cuſhney's will his widow is only to life-rent his eſtate; an though ſhe be named executrix and univerſal legatrix, yet he ex preſſes that his intention was to empower her to make an inventor of his perſonal eſtate, and to manage all for the good of h grand-children: That his will might not be altered, he added clauſe to it, which his wife and daughter ſubſcribed, whereb they conſent to every article therein recited, and bind themſelv never to do any thing prejudicial to the will, and to which th appellant is a ſubſcribing witneſs. Nor does it appear, that th widow ever deſigned the contrary; for nine months after the date c the aſſignment there was an appriſing on the ſaid bond, at her in ſtance, againſt the debtor's eſtate; and the aforeſaid blank in th aſſignment, in which ſhe intended to put her grandſon's name *is filled up with the appellant's name, in a different hand and in from the body of the writing.* Nor is there a ſum ſpecified in th aſſignment as the valuable conſideration, which is neceſſary an uſual according to the forms practiſed in Scotland. The appel lant contended, that he had paid two debts of Cuſhney's, one t Innes of Towybeg, and the other to Forbes of New, which wer the onerous conſideration thereof: But that theſe debts were not th onerous conſideration appears by the appellant's giving the reſpon dent a bond in 1688 (22 years after the aſſignment) to relieve him of Innes's debts, becauſe the appellant had received 50*l.* of th *Maſter of Salton* upon the reſpondent's account, which is acknow ledged in the ſaid bond of relief for paying that debt.

The reſpondent does not ſue in right of his mother and grand mother, but as heir at law and executor of his grandfather Cuſh

ney

ney, to whom the ſaid bond was conveyed by his wife and her ſiſter; and therefore her diſcharge to the appellant could not invalidate the reſpondent's right, nor could it comprehend or acquit the appellant of his future actings, he having received the ſaid ſum twelve years after the date of that diſcharge. And that bond being ſecured by a real right, no general words in a diſcharge can be an acquittance of it.

After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the ſeveral interlocutors therein complained of be affirmed: And it is further ordered, that the ſaid appellant do pay, or cauſe to be paid, to the ſaid reſpondent, the ſum of 30l. for his coſts in this Houſe.* Judgment, 24 May, 1716.

For Appellant, *Rob. Raymond. Will. Hamilton.*
For Reſpondent, *Nathan Lloyd. James Steuart.*

Andrew Porteous in Deboig, - - *Appellant*; Caſe 42.
Thomas Fordyce, and Janet Scott his Wife, *Reſpondents.*

26th *May* 1716.

Cautioner.—A perſon who had, without confirming, intromitted with his father's effects, which were left to him by will for payment of debts, is, upon application of the creditors, ordained to intromit with the effects upon inventorying the ſame, and finding caution to make the ſame forthcoming: he accordingly finds caution, and upon a ſubſequent application for ſummary intromiſſion with ſome of the effects, the Court refuſed the ſame, and ordained him to confirm the teſtament and proſecute in common form; but he neither inventoried the effects, nor confirmed the teſtament; the cautioner was liable for the whole goods intromitted with.

Proof.—A debt againſt this cautioner ſubſtantiated by the oath of the intromitter in another cauſe.

Coſts—40*l.* coſts given againſt the appellant.

ROBERT Scott of Gilleſbie, deceaſed, grandfather of the reſpondent Janet, by his will and teſtament, dated the 25th of December 1706, bequeathed all his perſonal eſtate to Thomas Scott his ſecond ſon, with expreſs directions to pay the ſeveral debts in the ſaid will mentioned, and appointed the ſaid Thomas his ſole executor. Amongſt other debts in the ſaid will mentioned and ordered to be paid, Robert Scott charged himſelf as debtor to the reſpondent Janet in the ſum of 4573*l.* 13*s.* 8*d.* Scots.

After the deceaſe of the ſaid Robert Scott, the ſaid Thomas poſſeſſed himſelf of ſeveral of the goods and effects granted to him as aforeſaid, but did not confirm himſelf executor to his father. The reſpondent Janet, and other creditors of the ſaid Robert Scott, in July 1708, brought their action againſt Thomas for payment of their debts, and by a petition preſented for them ſtated their apprehenſion that Thomas Scott, his mother and brother Francis might conſederate and waſte the funds appropriated for the payment of their debts, and therefore prayed,

that Thomas Scott might inventory the ſaid goods and effects, and find ſecurity for the due application thereof, in terms of the will. In anſwer to this petition Thomas Scott acknowledged the ſaid will, and that he intended to execute the ſame, and pay all his father's debts; and that he was willing to find ſecurity for the due management and application of the truſt funds. The Court accordingly, on the 31ſt of July 1708, "Authorized and ordained the ſaid Thomas Scott to intromet with, ſell, and diſpoſe of the ſaid goods upon inventorying thereof, he finding ſufficient caution to make the ſame, or prices thereof, forthcoming to theſe who ſhall be found to have beſt right thereto." Accordingly, in theſe terms the appellant became cautioner or ſurety for the ſaid Thomas Scott.

In November 1709 Thomas Scott applied by petition to the Court, praying that he might have a warrant for ſummary intromiſſion with certain of the goods and ſtocking in the hands of the widow and youngeſt ſon; and on the 25th of that month, the Court "refuſed to allow Thomas Scott ſummary intromiſſion with the goods and ſtocking; but ordained him to confirm his father's teſtament, and proſecute his right in common form as accords."

Thomas Scott, however, neither confirmed the teſtament nor made up inventory: And in June 1715 the reſpondents brought an action againſt the appellant as cautioner for the ſaid Thomas Scott for payment of the ſaid debt of 4573*l.* 12*s.* 8*d.* Scots due to the reſpondent Janet by the deceaſed. The appellant made defences, that the ſequeſtration could extend no further than the effects received thereupon ſubſequent to it, and before the ſame was withdrawn by the Court, when in November 1709 they ordained Thomas Scott to confirm his father's teſtament; and that the appellant could never be liable for the whole effects received before the caution given, much leſs for thoſe in the poſſeſſion of the widow and ſon, with which Thomas had never intrometted. This cauſe coming to be heard before the Lord Ordinary his lordſhip, on the 22d of July 1715, "found that the appellant "as cautioner, muſt be liable for the haill goods intrometted with "by the ſaid Thomas Scott, as well before as after the ſequeſtration; and found that by Thomas Scott's acknowledgment upon "oath in the decree obtained at the inſtance of Crawfurd of "Brocklock againſt him, as well as in the former decree in the "proceſs againſt the ſaid Thomas it is ſufficiently proved that he "intromitted with goods, and gear of his father's to the value of "the ſums principal, and annual rents claimed by the reſpondents; and therefore found the appellant as cautioner for the "ſaid Thomas Scott liable to the reſpondents for the ſums principal and annual rents libelled for, and decerned againſt him "therefore."

The appellant reclaimed, and the reſpondents having given in anſwers, their lordſhips, on the 29th of July 1715, "adhered "to the interlocutor of the Lord Ordinary, and refuſed the deſire "of the petition." The appellant preſented a ſecond reclaiming petition, ſtating, that Thomas Scott's oath in Brocklock's cauſe could

could not affect the appellant, ſince it was *res inter alios acta*, and beſides contained this quality, that all he had received was applied in payment of his father's debts; and therefore the appellant prayed, that the Court would find that Thomas's intromiſſions were exhauſted by payment of his father's debts, or by expences in making the funds effectual, and to aſſign the appellant a term for proving thereof. After anſwers for the reſpondents, the Court, on the 30th of July 1715, "refuſed the deſire of the petition, and adhered to their former interlocutors."

The appeal was brought from "an interlocutor of Lord Kimmerghame Ordinary of the 22d of July 1715, and alſo from an interlocutor of the Lords of Seſſion of the 29th of the ſaid month, affirming the aforementioned interlocutor; and likewiſe from another interlocutor of the ſaid Lords of the 30th of the ſame month." Entered, 23 Jan. 1715-16.

Heads of the Appellant's Argument.

The appellant cannot be liable to the reſpondent's demands, becauſe the bond that he entered into, purſuant to the ſaid decree of the Court of Seſſion of the 31ſt July 1708, was expreſsly annulled and made void by a ſubſequent ſentence of their lordſhips on the 25th of November 1709, whereby the firſt decree was recalled, and Thomas was ordered to confirm or prove his father's will in common form; which, by the known law of Scotland, requires him to find another cautioner or ſurety for his due adminiſtration.

Though the decree of the 31ſt of July 1708, allowing Thomas to intromet, be in general terms, yet the appellant, as ſurety for that intromiſſion, cannot be conſtrued to be liable for any other effects than what were then in ſome other perſon's poſſeſſion; becauſe neither the creditors nor Thomas could crave poſſeſſion of what they or he was actually poſſeſſed of before. Nor could Thomas Scott be ſuppoſed to have applied for a compulſitor for the recovery of any goods, but what had not been formerly in his poſſeſſion; and therefore the appellant can be liable for no more than what actually was or might have been received by virtue of the ſaid ſequeſtration: For, ſuppoſing that ſome other perſon than Thomas had been allowed to intromet with the goods for the uſe of the creditors upon finding ſurety, and that the appellant had been bound for that other perſon's due application of the money, certainly his bond could not have been extended to the money received before that time by Thomas, and applied in the terms of the diſpoſition. And the appellant conceives that if Thomas had been called to an account by the perſons allowed to intromet, it would have been a good defence for Thomas to have pleaded payment according to the diſpoſition by his father to him.

It is true that Thomas had acknowledged upon oath in another cauſe that he had received 13,000 merks Scots out of the goods and effects conveyed to him by his father; but all of it before the appellant's becoming ſurety for him; and the oath itſelf particularly mentions, that the ſum was wholly applied towards the payment

ment of his father's debts, as by the ſaid diſpoſition is directed, which the appellant offered to prove below, but was refuſed.

The appellant inſiſts and is adviſed, that he might have excluded the reſpondent's claim, by offering to prove and proving in the terms of his obligation, that the intromiſſions were made forthcoming to thoſe who had beſt right, but the appellant was denied that benefit.

Heads of the Reſpondents' Argument.

The appellant was ſecurity for the ſaid Thomas Scott's juſt application of the truſt veſted in him, and for making up an exact inventory, which muſt have contained the whole goods and effects bequeathed to him and the values thereof: For the creditors muſt have had moſt in view the due adminiſtration of what he was poſſeſſed of, ſince that was by far the greateſt part. Nor did the Court ever re-call this power granted to Thomas, but only declined to give him an extraordinary power of immediate intromiſſion againſt his father's debtors; this was juſtly refuſed, and he ordered to follow the rules of law. And if it ſhould be admitted that this could have been interpreted as a re-calling of the power as to the effects in the poſſeſſion of other people, it could make no alteration as to thoſe Thomas himſelf was poſſeſſed of.

Thomas Scott having accepted of the truſt, wherein the debts to be paid are particularly ſpecified without proving the will or making any inventory, the law of Scotland preſumes, that he had received as much as would pay the debts particularly ſpecified. Nay, the law preſumes by his acceptance in this manner, that he agreed to charge himſelf with the debts, and take his hazard of the extent of the effects bequeathed to him: For, otherwiſe the creditors in ſuch caſes might be precluded from recovering their debts, ſince they have no rule whereby to charge the executor in truſt, and if Thomas was liable, the appellant was liable as his ſecurity. But further, the ſaid Thomas in another action owned upon oath that he had received to the value of 12,000 or 13,000 merks Scots, and ſets forth how he had diſpoſed thereof, and charges the debt due to the reſpondent Janet as one of the debts he was obliged and intended to pay.

Judgment, 26 May 1710.

After hearing counſel, *It is ordered and adjudged, that the ſaid petition and appeal be diſmiſſed, and that the ſeveral interlocutors therein complained of be affirmed: And it is further ordered, that the ſaid appellant do pay, or cauſe to be paid to the ſaid reſpondents, the ſum of 40l. for their coſts in this Houſe.*

For Appellant, *Rob. Raymond. Sam. Mead.*
For Reſpondents, *J. Jekyll. Da. Dalrymple.*

ohn Cuninghame of Enterkine, - - *Appellant;* Caſe 43.
he Hon. Katherine Hamilton, Relict of Wm. Cuninghame of Enterkine, the Appellant's Mother, - - - *Reſpondent.*

8th *June* 1717.

Tenor.—The tenor of a loſt deed of remuneration to a wife over certain lands, for part of her joinʼture ſecured upon other lands renounced by her, found to be proved by an inſtrument of ſaſine; a deed in which the remuneratory deed was recited, and a ſlender proof by witneſſes:

It was not neceſſary to prove the *caſus amiſſionis* in this caſe:

The defender having claimed a proof that his mother, the purſuer, in his minority, had intromiſſion with all his father's deeds and writings, the ſame is refuſed.

BY the marriage contract between the appellant's father William Cuninghame and the reſpondent, in December 1676, John Cuninghame of Enterkine, the appellant's grandfather, in conſideration of the ſaid marriage and of 777*l.* ſterling, the reſpondent's portion, did ſettle upon her a life-rent of 275*l.* ſterling, payable out of the barony of Monktoun and other lands, in which ſhe was duly infeft.

About ſeven years after the marriage it became neceſſary to ſell the ſaid lands of Monktoun, and on the 11th of October 1683, the reſpondent joined in a deed with her huſband, legally ratified by her, to re-convey the ſaid lands to the grandfather. But ſhe retained a life-rent of 100*l.* iſſuing out of other lands ſettled for that purpoſe by her marriage contract.

The reſpondent ſtates, that in conſequence of her renouncing her intereſt in the lands of Monktoun, the appellant's father did, in recompence and remuneration of the lands ſo renounced, execute a deed, ſettling upon the reſpondent the lands of Enterkine and others in life-rent; and that upon this deed ſhe was duly infeft, on the 21ſt October 1683, and the ſaſine recorded the 20th of November thereafter: That after her huſband's death in 1690, ſhe entered to poſſeſſion of the lands of Enterkine, and continued without interruption in the ſame; but having loſt the remuneratory deed the appellant queſtioned her right, and ſhe, in December 1711, commenced an action for proving the tenor of the loſt deed, before the Court of Seſſion againſt the appellant.

The appellant at firſt inſiſted that the reſpondent ſhould prove the *caſus amiſſionis* of the deed, and he himſelf craved a proof that the reſpondent had had a total intromiſſion, with his father's title-deeds after his death, before proceeding to a proof of the tenor: But the Court, on the 13th of February 1712, allowed the reſpondent to proceed in her action. Accordingly, ſhe inſiſted upon ſeveral adminicles or vouchers to prove the tenor of the deed; Theſe were, 1ſt. The probability that the reſpondent ſhould be

be ſecured in lands equivalent to thoſe ſhe had renounced. 2d. An inſtrument of ſaſine in favour of the appellant, dated the 21ſt of October 1683, bearing that in purſuance of a deed then delivered to the notary by the appellant's father, and read in preſence of the witneſſes, ſaſine was made and given to the reſpondent of the ſeveral lands in queſtion. A diſpoſition, dated the 11th of Auguſt 1683, ſigned by the appellant's grandfather and father, in which the whole eſtate was conveyed to the latter, in three ſeveral parts of which was a reſervation of the reſpondent's life-rent in the lands now claimed. And laſtly, She examined two witneſſes the import of whoſe depoſitions ſhe ſtates to be, 1ſt, Colin Campbell ſwears, he ſaw a life-rent deed granted to the reſpondent out of her huſband's eſtate, but cannot remember the particular lands being at 28 years diſtance, only that the lands of Enterkine and ſome other lands were mentioned in that deed; (the reſpondent had no right to theſe lands by her marriage ſettlement). The other, Mr. Baillie of Lamingtoun, when he ſigned as a witneſs to the reſpondent's renunciation, was aſſured by the appellant's father, that the reſpondent was ſecured in the equivalent of what ſhe had renounced.

After a hearing of the cauſe, the Court, on the 18th of June 1713. "found the tenor of the remuneratory or compenſatory "right and diſpoſition libelled or granted by the ſaid William "Cuninghame of Enterkine, with the conſent of John Cun- "inghame of Enterkine, his father, to and in favour of the "reſpondent, of the date and contents particularly above "mentioned, made up and proved, and therefore decerned and "declared the ſaid deed to be a ſufficient and valid evidence "and of as great force and effect as if the ſaid remuneratory "deed itſelf were yet extant, and not omitted and loſt-*caſu fo-* "*tuito.*" The appellant reclaimed two ſeveral times againſt the interlocutor, but the Court adhered to the ſame.

Entered 21 Feb. 1716-17.

The appeal was brought from "an interlocutor of the Lords of "Seſſion of the 18th day of June 1713, and the affirmance "thereof."

Heads of the Appellant's Argument.

When this action was firſt commenced, the Court did refuſe the appellant the benefit of proving that the reſpondent had total intromiſſion, with his father's whole writs and evidents when he the appellant was under age. This probation, if it had been allowed, might in all probability have cleared this affair.

The law of Scotland, and the conſtant practice of the Court of Seſſion, require that when iſſue is joined and no proof made of the *caſus amiſſionis*, the action is to be diſmiſſed; yet the Court allowed the reſpondent to proceed in her action without proving the *caſus amiſſionis*, and to proceed in the proof of the other parts of her libel.

The reſpondent has proved nothing of the other parts of her action by the adminicles or vouchers ſhe brought into the court below; for

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1ſt. The conveyance by the appellant's grand father can be no voucher. This conveyance contains nothing of the ſubſtance of the deed pretended to be loſt, only the additional lands claimed by the reſpondent are in the deed, partly interlined and partly written on the margin thereof, not ſubſcribed; nor are they written with the ſame hand or ink with the reſt of the conveyance, as evidently appears by inſpection. Such interlineations and unſubſcribed margins are by the law of Scotland entirely null and void, as appears by the act of parliament 1681. c. 5. wherein it is ſtatuted, "That all writs to be ſubſcribed hereafter, wherein the writer and witneſſes are not deſigned, ſhall be null." But neither the writer of this interlineation and unſubſcribed margin, or who were witneſſes thereto, are deſigned in this conveyance of 16th Auguſt 1683. 1681, c. 5.

Nor does the interlined conveyance recite the ſubſtance of the ſaid loſt deed, or any clauſe of it: It mentions, too, that the deed pretended to be loſt was of the ſame date with the ſaid conveyance; yet by the oath of William Baillie, the reſpondent's own witneſs, it appears that he was a witneſs to the ſaid conveyance the 16th of Auguſt 1683, but depones that at that time there was only a deed *to be done* in favour of the reſpondent. And further, though the ſaid conveyance mentions alſo in the body thereof, that the reſpondent's renunciation of Monktoun is likewiſe of the ſame date with the deed; yet notwithſtanding the renunciation proves itſelf to have been made two months after the date of the ſaid conveyance, viz. on the 11th of October 1683.

2d. Neither can the reſpondent's infeftment be admitted as a voucher of the ſubſtance and reality of the deed pretended to be loſt, becauſe it is not a notary's buſineſs to enquire into the ſubſtance or verity of deeds, for he can infeft perſons at any diſtance of time after ſigning, without making any enquiry whether the deed be true or falſe. But it is evident from the ſaid inſtrument of ſaſine that there was no ſuch deed as pretended by the reſpondent, and that the notary gave the reſpondent infeftment upon the foreſaid interlined conveyance only. For in the clauſe of Having and Holding the interlined conveyance only is narrated, and alſo it appears that there was a blank left in the inſtrument of ſaſine which ſhould have been filled up with the date of the pretended deed (if there had been one); but this blank is filled up ex poſt facto with the date of the interlined conveyance only, which neither contains the ſubſtance of the pretended deed, nor is there any precept in this interlined conveyance for infefting the reſpondent. And therefore the date of the ſaid interlined conveyance was ignorantly inſerted in the blank which is in the inſtrument of ſaſine, inſtead of the date of a deed that had a precept or warrant for infefting the reſpondent. The Court below has always rejected the inſtruments of notaries as a proof of the ſubſtance and verity of deeds, as appears in the caſes decided 14th June 1667, Harroway v. Haitly, and Corſar v. Durie in Dirleton's deciſions, and the caſe decided 15th July 1675, Phumerton v. Luteſort in Stair's deciſions.

3d. Nor

3d. Nor is there any part of the tenor of the deed pretended to be loſt proved by the reſpondent's two witneſſes, viz. Mr. Baillie and Mr. Campbell. From their depoſitions it appears that they prove nothing as to the reality, the tenor, the date, the writer's name, the parties ſubſcribing, or the witneſſes ſubſcribing to the ſaid deed pretended to be loſt. Theſe are the eſſentials of every deed, and the proving of them in ſuch a caſe as this is abſolutely required of a purſuer by the law of Scotland.

Heads of the Reſpondent's Argument.

Though the reſpondent had intromitted with her huſband's papers, as ſhe never did, and had got the remuneratory right there, yet it was ſtill a deed belonging to her, and was the ſame as if it had been lying by herſelf, ſince the taking infeftment upon it was a clear evidence of her huſband's intending it for her ſecurity. And that ſhe had again renounced that right in favour of her huſband, is not probable; for the law of Scotland appoints ſuch renunciations to be recorded within ſixty days after they are executed, and if there had been ſuch, the appellant might have got an office copy of it.

The proving of the *caſus amiſſionis* in all caſes of proving the tenor of a deed is not neceſſary. It is indeed reaſonable to be done in caſes where the execution of a deed is the only ſolemnity required, and the retiring or cancelling is a ſufficient releaſe. But in rights of lands, as this is, which require other ſolemnities than the deed itſelf, ſuch as ſaſine, &c. the retiring of the deed is not a ſufficient diſcharge, becauſe the inſtrument of ſaſine remains upon record. So that nothing but a formal diſcharge or renunciation could extinguiſh that right, as is obſerved by Lord Stair in his Inſtitutions, and it is alſo cleared by a deciſion of the Lords of Seſſion, 26th July 1662, Lady Miltoun againſt her Huſband; and therefore in ſuch caſes the preſumption is that the right was truly loſt.

Stair's Deciſions.

Though the appellant pretended that the inſtrument of ſaſine was only the aſſertion of a notary, and would not prove any thing; yet theſe inſtruments being admitted by public authority, great deference and faith is had to their veracity. And the inſtrument of the notary is not the only voucher in this cauſe, though if there were no other proof even that would be ſufficient. The precedents quoted by the appellant differ from the preſent caſe: the reſpondent renounced her jointure, in which ſhe was ſecured by her marriage-ſettlement, which was the onerous cauſe of granting her a remuneratory right. But all ſuſpicion of any kind is certainly taken off by this, that ſaſine was given to the reſpondent upon the remuneratory right by her huſband's order ſeven years before he died by the ſame notary, and in preſence of the ſame witneſſes who infeft the appellant in the fee of the eſtate; and immediately thereafter both inſtruments were put in the public record by the ſaid notary.

But another proof of the deed in queſtion (and which of itſelf is ſufficient) was the deed of ſettlement, made upon the appellan

wherein there is a particular proviſo in three ſeveral parts thereof, reſerving to the reſpondent the lands in queſtion ſettled upon her as a jointure in lieu of the lands of Monktoun, which ſhe had renounced. By that deed it is evident that a remuneratory right or deed in lieu of what the reſpondent had renounced was granted to her; ſo the inſtrument of ſaſine in purſuance of the deed in queſtion is in theſe very lands, as inſerted in the conveyance to the appellant. In this deed to the appellant the greateſt part of the lands claimed by the reſpondent are inſerted in the body of the deed, but the blank left for them being too ſmall, the reſt were written upon the margin, as it uſually happens in ſuch caſes, but by the ſame hand, though a little contracted. But what ſeems to take off every appearance from the appellant's objection is, that the words following are all in the body of the deed, "reſerving to the reſpondent during all the days of her "lifetime." (Then follow the lands, part in the body and part on the margin,) "all lying in the barony of Torbolton, bailliery "of Kyle, ſtewartry and ſheriffdom of Ayr, whereunto ſhe is "now provided by me in life-rent conform to a heritable bond "of the date of theſe preſents, in lieu and recompence of the "lands of Monktoun, &c. whereunto ſhe was likewiſe provided "and infeft in life-rent by virtue of her contract of marriage, "and which now at my requeſt and deſire ſhe has diſponed and "renounced," &c. And as this deed ſhews that a recompence was granted, ſo the lands being ſpecified and aſcertained in the deed, ſufficiently make up the loſs of the reſpondent's jointure-deed: and whether the appellant enjoy the eſtate in virtue of that deed or not, does not alter the caſe; ſince he does not deny that it was a true real deed done by his father.

There is no occaſion for witneſſes, where the deed and ſolemnities are proved by writing, as in this caſe they are by the inſtrument of ſaſine, and deed of ſettlement to the appellant.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutor and affirmances thereof complained of in the ſaid appeal be affirmed.* Judgment, 8 June 1717.

For Appellant, *Dun. Forbes. Spencer Cowper. Rob. Raymond.*
For Reſpondent, *N. Lechmere. Will. Hamilton.*

Caſe 44. Fountain-hal', 19 Dec. 1701. Forbes, 25 July & 22 Nov. 1705.

George Hamilton, an Infant, and William Hamilton of Grange, his Father, Tutor and Adminiſtrator in Law, - - *Appellants*;

Captain George Boſwell, Brother to David Boſwell of Balmutto deceaſed, - - *Reſpondent.*

10th *Feb.* 1717-18.

Repreſentation.—A diſpoſition is made by a perſon to one of his daughters, a the heirs of her body, whom failing to ———, his heirs and aſſignee upon this diſpoſition the daughter is infeft, and dying without iſſue, her ſi is ſerved *tanquam legitima et propinquior hæres* to the father and her: it found that the ſervice ought to have been as heir of proviſion.

Curteſy.—An heireſs's infeftment, reduced after her death for informality, h not quarrelled in her lifetime, is ſufficient to ſupport the curteſy.

JOHN Bruce of Weſter Abnie, deceaſed, had two daughter Margaret and Elizabeth. Margaret the eldeſt was married the reſpondent, Captain Boſwell; and had iſſue one daughte Margaret Boſwell, who afterwards became the wife of the appe lant William, and mother of the appellant George. John Bruc the father, made a diſpoſition of the ſaid lands of Weſter Abn and others to his ſaid daughter Elizabeth, and the heirs of h body, whom failing to ———— his heirs and aſſignees wha ſoever. The ſaid John Bruce ſoon after died, as did alſo the ſai Elizabeth his daughter, (to whom infeftment had been given o the diſpoſition), without heirs of her body; whereby the ſai ſubjects deſcended to Margaret Boſwell, daughter of the reſpon dent and the ſaid Margaret, the daughter of John Bruce, Mar garet the mother being then deceaſed.

The reſpondent's daughter being under age, he had cauſed he to be ſerved *in ſpecial tanquam legitima et propinquior hæres* to he grandfather John Bruce and her aunt Elizabeth; and after thi ſervice infeftment was taken, and the inſtrument of ſaſine dul recorded. The reſpondent entered to the poſſeſſion of the eſtate and received the rents and profits thereof.

By contract of marriage, entered into in October 1698, be tween the appellant William, and the reſpondent on the part o the ſaid Margaret his daughter, it was agreed, that the reſponden ſhould give his daughter 6000 merks in marriage portion; and in conſideration thereof, that ſhe and the ſaid William Hamilton, after their marriage, ſhould make a conveyance in favour of the reſpondent, her father, of the eſtate ſhe had ſucceeded to as afore ſaid. The marriage accordingly took effect, and in conſequence of the ſaid contract or agreement, the appellant William, and hi wife Margaret, who was ſtill under age, executed a diſpoſition o the premiſes to the reſpondent.

Soon after the appellant William and his wife brought an actio before the Court of Seſſion againſt the reſpondent for reductio

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of the ſaid contract or agreement, and the diſpoſition made in conſequence thereof, as being obtained by fraud, and while Margaret was under age. The purſuers ſtated, that at the time of the treaty for the marriage, the reſpondent repreſented the eſtate to be worth nothing, as being greatly incumbered, and inſufficient to anſwer the debts: that however out of regard to his daughter the reſpondent propoſed to give her the ſaid 6000 merks, in conſideration of their conveying the eſtate to him. And that the purſuers being entire ſtrangers to the circumſtances of the eſtate, and relying upon the reſpondent's veracity, agreed to the terms propoſed.

After ſundry proceedings in this action, and a proof relative to the leſion taken therein, the Court, on the 19th of December 1701, found "That Margaret Boſwell, being a minor when ſhe "ſigned her marriage contract and the diſpoſition, ſhe ought to "be relieved againſt the ſame; but, that William her huſband, "being of age, and having proved no concuſſion or circumven-"tion, the reaſons offered by him were not ſufficient to relieve "him againſt the deeds ſubſcribed by him before and after his "marriage; and therefore aſſoilzied the reſpondent from his "action." And after a count and reckoning, the Court, on the 25th of July 1705, "reduced the ſaid deeds in ſo far as they "were granted or ſubſcribed by the ſaid Margaret Boſwell, and "could be any way extended againſt her and her heirs; and "found that ſhe ought to be reponed againſt them upon enorm "leſion and minority; and likewiſe reduced the ſaid obligation "entered into by the appellant William, whereby he under a "penalty obliged himſelf, that the ſaid Margaret ſhould convey, "but the appellant William being major aſſoilzied the reſpon-"dent from the ſaid action ſo far as the ſaid appellant Wil-"liam could have any right by his *jus mariti* or curteſy to the "ſubject diſponed by his wife and him to the reſpondent (*a*)."

Margaret, the reſpondent's daughter, dying in 1710, the appellant William, her huſband, cauſed their ſon the appellant George to be ſerved heir to John Bruce his great grandfather, and Elizabeth his great aunt: and thereupon commenced two ſeveral actions in the name of his ſon before the Court of Seſſion, againſt the reſpondent; the one to reduce and make void the rights and titles that had been eſtabliſhed in the perſon of Margaret the wife; and the other to remove the reſpondent from the life-rent eſtate.

The cauſes were conjoined, and after ſundry proceedings the Court, upon the 29th of June 1714, "Found that by the con-"ception of the diſpoſition by John Bruce to Elizabeth, and ſhe "having died without heirs of her own body, the ſucceſſion did "not devolve upon Margaret Boſwell as heir of line to Eliza-"beth, but devolved upon the heirs of line of John Bruce as "heirs of proviſion to Elizabeth, and that the titles the appellant

(*a*) Theſe interlocutors and affirmances thereof form the ſubject of a ſecond appeal between the ſame parties in 1721; but they do not enter into the preſent queſtion.

" had made up for his ſon carried only the right of ſuperior " and were not ſufficient in a removing."

The appellant George's titles were made up of new in terms that interlocutor; and it was contended on his part that his n ther's ſervice and ſaſine not being as heir of proviſion to Elizabe the ſame was void. The Lord Ordinary, by interlocutors on 25th of January and 25th of February 1714-15, reduced the ſ Margaret's " ſaſine, and decerned the reſpondent to quit the p " ſeſſion, ſince Margaret was not ſerved heir of proviſion to E " zabeth." But the Court, on the 24th of June 1715, " fou " that Margaret Boſwell's relation was cognoſced both to Jo " and Elizabeth Bruce in terms of the foreſaid interlocutor of " 29th of June, and remitted it to the Lord Ordinary to h " parties upon the nullities objected to Margaret's infeftment

Parties being afterwards heard on the alleged nullities of retour and infeftment, before the Lord Ordinary, his lordſhip, the 15th of July 1715, " ſuſtained the firſt nullity objected agai " Margaret Boſwell's retour as heir to the deceaſed Elizab " Bruce, in regard Elizabeth Bruce was infeft upon her fat " John Bruce his precept in all the lands diſponed by him to h " whereby ſhe held the lands of John Bruce the diſponer, a " not of the crown as the record bears. And as to the ſecc " and third nullities that the precepts for infefting the ſaid M " garet were not directed to the proper officers ſuſtained " ſame, and likewiſe the objection againſt the ſaid Margar " infeftment of the burgage lands, in reſpect her predeceſſor I " zabeth Bruce her infeftment therein was null, the ſame be " ing to be paſt on the precept in John Bruce's diſpoſition, a " yet that precept of ſaſine does not contain theſe lands."

The reſpondent having reclaimed againſt this interlocutor, ſiſted, that though there might have been ſome omiſſions in form of paſſing theſe ſaſines, yet although ſhe had never been feſt the curteſy ought to ſubſiſt; and in ſupport thereof he foun 1695, c. 24. upon the act of parliament 1695, c. 24. intitled, " Act for " viating the frauds of apparent heirs." And he contended t ſhe having been in poſſeſſion for many years, the appellant her could not paſs by her, but muſt be liable to her deed, wher the curteſy to her huſband was ſupported. And 2dly, That infeftments, not having been objected to in Margaret's lifeti were ſufficient to ſupport the curteſy. The Court, on the 2 of July 1715, " repelled the defence upon the act of parliame " but found, that Margaret Boſwell's infeftment not having b " quarrelled in her own lifetime was ſufficient to ſupport " curteſy." And upon the 28th of July " aſſoilzied the reſp " dent from the appellant's action."

The appellants having reclaimed, the Court, on the 15th June 1716, " found, that the reſpondent's right to the curt " ought to ſubſiſt, in regard if his daughter's infeftment had b " quarrelled in her lifetime, he might have made up the defe " thereof by infefting her again." And to this interlocutor Court adhered on the 4th and 20th of July thereafter.

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The appeal was brought from "an interlocutor of the Lords of Seſſion, made the 24th of June 1715, and from that part of the interlocutor of the 27th of July following, finding Margaret Boſwell's infeftment not being quarrelled in her lifetime was ſufficient to ſupport the curteſy; and alſo from the interlocutor of the ſaid Lords of the 28th of July 1715, the 15th of June, 4th and 20th of July 1716." Entered, 22 March 1716-17.

Heads of the Appellant's Argument.

Since the Court, by their interlocutor of the 29th of June 1714, found, that the ſucceſſion did not devolve upon Margaret Boſwell as heir of line to Elizabeth, but to the heirs of line of John Bruce as heirs of proviſion to Elizabeth, and upon this foot the appellant George was obliged to be ſerved of new; it is hard to conceive how Margaret could claim the ſucceſſion, ſince ſhe is ſerved only heir general to Elizabeth, which is entirely different from what the interlocutor requires; for in that caſe ſhe ought to have been ſerved *tanquam hæres proviſionis*, or *hæres virtute proviſionis*; and it is impoſſible that a perſon can be ſerved heir of proviſion, and the ſervice and retour ſay nothing of it.

The deed of conveyance made by the ſaid Margaret and the appellant William of the lands in queſtion to the reſpondent was reduced and declared null upon the head of minority and leſion, in ſo far as concerns the intereſt of Margaret and her heirs, but in ſo far as concerns the appellant William's curteſy it is not reduced. If Margaret the wife, however, was never infeft, then the huſband could convey no curteſy, becauſe he could have none. And it is an undoubted principle that the huſband can have no curteſy but of ſuch lands as the wife was in her lifetime ſeiſed in: but the wife in this caſe was not ſeiſed, or, which is the ſame thing, was not not duly ſeiſed, and her infeftment was null. If then the wife was not infeft, or if her infeftments were null, and the ſucceſſion did not really devolve upon her, how can that infeftment ſuſtain a curteſy?

Heads of the Reſpondent's Argument.

Margaret was ſerved *tanquam legitima et propinquior hæres* to John her grandfather, and to Elizabeth her aunt; which being a general deſignation, applicable to all heirs *in ſuo genere*, though it did not expreſs the word *heir of proviſion*, the ſame muſt be underſtood under all the characters, whereby ſhe could repreſent them, and infeftment and poſſeſſion of the lands was taken upon that ſervice. The Court of Seſſion, by their precedents (in Forbes's Deciſions), Livington *v.* Menzies, 22d January 1706, and Lord Dalhouſie *v.* Lord and Lady Hawley, 13th November 1712, eſtabliſhed this doctrine. And the reaſon is ſtronger in this caſe, where Margaret was ſerved heir in ſpecial to her grandfather and aunt, which includes a general ſervice.

Though the ſaſines were reduced, yet the huſband's curteſy muſt ſubſiſt, becauſe there was no leſion to the heirs of the marriage; for when Margaret the heireſs died, ſhe ſtood infeft, and

in poſſeſſion from the date of her ſervice to her death, which was ſome years, and her father accounted to her and her huſband for the rent of the eſtate till her marriage, and conſequently the curteſy once took place, and ſo accreſſed to the reſpondent all the time ſhe lived; and, if the reſpondent had not depended upon the diſpoſition made to him by his daughter and her huſband, he could eaſily have ſerved her heir to her aunt and grandfather in the ſame manner the appellant William has done his ſon. It will not be pretended, that the appellant George could have ſucceeded while his mother lived; and for the ſame reaſon, not ſo long as his father lives; for it is not to be ſuppoſed, that his own birth, entitled him both to the fee and life-rent of the eſtate, and ſo to exclude his father and mother's intereſt therein. And it is obſerved by Lord Stair, in his printed Deciſions, Gray *v.* Gray, 25 July 1672, that although an infeftment or ſaſine were reduced as to the fee, yet that it did ſubſiſt as to the huſband's life-rent; becauſe, that there was thereby no leſion to the heirs, ſeeing it was preſumed the huſband would have cognoſced his ſpouſe heir, if that infeftment had been quarrelled in her lifetime, and ſo enjoyed the curteſy.

Journal, 10 Feb. 1727-8. After hearing counſel, *It is ordered and adjudged, that the ſaid petition and appeal be diſmiſſed this Houſe, and that the ſeveral interlocutors therein complained of be affirmed.*

On the point of the *repreſentation*, the precedent does not appear to be obſerved by former Collectors of Deciſions.

A part of the cauſe between the parties is given by Bruce but it ſeems merely interlocutory, being, in effect, ſubſequently reverſed by the Court.

an Baſkett, his Majeſty's Printer in London, William, Agnes, and Elizabeth Hamilton, Grandchildren to the deceaſed Andrew Anderſon, and Archibald Campbell Huſband of the ſaid Agnes, and Patrick Alexander Huſband of the ſaid Elizabeth, for their Intereſts, and John Campbell Printer in Edinburgh, claiming to be his Majeſty's Printers in Scotland, *Appellants;*

mes Watſon, claiming to be one of his Majeſty's Printers in Scotland, - - *Reſpondent.*

Caſe 45.

15th *Feb.* 1717-18.

Public Officer.—A gift of the office of King's Printer in Scotland is made to a perſon and his heirs, and his partners, aſſignees, and ſubſtitutes; he afterwards aſſigns to two others, each one-third of the patent; theſe aſſignees and the original grantee had each right to a third ſhare in the grant of the office, equal in all reſpects, and each might uſe the title of one of his Majeſty's Printers.

Certain objections made to an aſſignee under this grant, that the original grantee had not taken the oaths required by law, for taking which a ſpace of time was limited, having aſſigned in the intermediate period; that this grant was made during the ſubſiſtence of a former grant, though to commence after expiration of ſuch former one; and that it contained clauſes and powers (ſome of which had been renounced) that were ſtated to be unuſual and contrary to law,—found not relevant to reduce the ſame.

A new patent being obtained during the currency of the former, without any reduction thereof, and being founded on in this action, the decree is nevertheleſs ordained to be extracted, without prejudice to the grantees in the new patent, to inſiſt on the gift in their favour as accords.

The Court having found, however, that the partners in the patent firſt mentioned might print Bibles, &c. and diſpoſe of the ſame *in any part of his majeſty's united kingdom or elſewhere*; upon appeal, theſe laſt mentioned words are ordered to be omitted in the affirmance of the judgment.

KING Charles the Second, in May 1671, granted a patent to Andrew Anderſon deceaſed and his aſſignees, to be his maly's printer in Scotland, with the ſole power of printing Bibles, ew Teſtaments, acts of parliament, and every thing publiſhed authority, for and during the term of 41 years. This patent pired on the 12th of May 1712.

Soon after it had been granted Andrew Anderſon died, and the ice was enjoyed and the buſineſs carried on by his widow.

When the patent to Anderſon was near expiring, the reſpondent, a printer in Edinburgh, Robert Freebairn, a bookſeller, and chard Watkins a ſtationer, the latter being truſtee for the pellant John Baſkett, his majeſty's printer in England, entered to an agreement to uſe their joint intereſt to procure a new patent. And accordingly by articles executed by them on the 9th f March 1710-11, it was agreed, "That if a grant of queen's "printer in Scotland could be obtained, in one or either of their

" names, or to any other perſon for their behoof, they ſhould b
" equally concerned in the ſame, and ſhould employ their intereſt
" conjunctly. And Mr. Freebairn obliged himſelf to go to Lon
" don; and the charges (if the ſaid grant was procured) were in
" reſpect of Freebairn's trouble therein to be borne by the oth
" two; but if the ſame did not ſucceed, Freebairn was to be
" equal charge with the reſt." And the reſpondent ſtates, th
he advanced to Freebairn 300*l.* towards the charges of obtainin
ſuch grant.

On the 11th of Auguſt 1711, her then majeſty granted h
letters patent of the office of king's printer in Scotland to the ſa
Robert Freebairn, reciting the ſaid former grant to Anderſon, a
the time it would expire; " and conſidering that it would be nec
" ſary for her and her ſubjects in that part of Great Britain call
" Scotland that the ſaid office ſhould be timely provided for: a
" that they on whom ſhe ſhould beſtow the ſame ſhould be pr
" vided with materials and printing inſtruments whereby th
" might more readily and commodiouſly ſerve her and her ſu
" jects in that part of her ſaid kingdom, as ſoon as the ſaid gr
" to Anderſon ſhould expire: and that the ſaid Freebairn h
" undertaken for himſelf and his heirs, and for his partne
" aſſignees, and ſubſtitutes, that all books to be there prin
" ſhould be more correctly publiſhed than heretofore they h
" been by his predeceſſors; her ſaid majeſty did make, nomina
" and appoint the ſaid Freebairn her ſole and only printer
" Scotland, for the term of 41 years, to commence immediat
" after the expiration of the ſaid grant to Anderſon, without p
" judice to the time therein mentioned; giving and granting u
" the ſaid Freebairn and his aforeſaids the ſole privilege of pri
" ing all Bibles, New Teſtaments, Pſalters, Common-prayer boo
" according to the uſe and cuſtom of Great Britain and Irelan
" and of printing and re-printing acts of parliament, procla
" tions, and whatever ſhould be publiſhed by authority; and
" the books of the common and municipal laws of Scotla
" whenſoever the grant thereof to her majeſty's then printer
" other particular perſons ſhould reſpectively expire;" with
clauſes and powers of prohibiting all others, and confiſcations
uſual in the like grants.

In September 1711, Freebairn aſſigned the third part of his intereſt to the appellant Baſkett; who by agreement was to credit the company with paper for 12 months, and alſo was to pay a moiety of the charges of paſſing the ſaid patent, and a proportionable part of the charges of ſetting up and hiring a printing-houſe. And on the 30th of April 1712, Freebairn alſo aſſigned to the reſpondent one juſt third part and ſhare of the ſaid office, and of all privileges and profits thereof; the 300*l.* advanced by him, as he ſtates, being more than his ſhare of the charges of obtaining the patent.

Diſagreements, however, ſoon aroſe among the parties, and in January 1713, the reſpondent took a proteſt under the hands of a notary, requiring Freebairn and Watkins (on behalf the appellant Baſket

Baſkett) to perform their reſpective parts of the ſaid agreement, or, otherwiſe, that he would act ſeparately. The reſpondent afterwards brought an action of declarator before the Court of Seſſion againſt Freebairn, the appellant Baſkett, and Watkins his truſtee; and his libel concluded, "That it ſhould be found and "declared, that the reſpondent had as good a right in the ſaid "gift of printing as the ſaid Freebairn and Baſkett, and that nei- "ther of them ought to aſſume other title, than one of his ma- "jeſty's printers, and that the reſpondent as one of his majeſty's "printers might print Bibles, acts of parliament, &c. and might "ſell and diſpoſe of the ſame in any part of the united kingdom "and elſewhere." Freebairn made defences, that the gift of the office was to him ſolely, and that the aſſignment was only of a ſhare of the profits, to be managed in company according to the articles. The Lord Ordinary, on the 8th of February 1715, "found that the reſpondent had a right to a third ſhare in the "gift purſued on, equal in all reſpects with the ſaid Freebairn "and Baſkett, and that he might uſe the title of one of his ma- "jeſty's printers." And this interlocutor was afterwards ad- hered to both by his lordſhip, and by the Court, on the 17th of June 1715.

Pending this action, the parties had acted ſeparately under the ſaid office; and on the 8th of December 1714 Freebairn, aſſiſted by the intereſt of Baſkett, obtained a warrant from King George the Firſt to have a new grant of the office made to him ſolely. The reſpondent, however, having repreſented that he had right under the ſaid patent granted by Queen Anne, a ſtop was put to the paſſing of the ſaid new grant.

The reſpondent afterwards brought an action againſt Agnes Campbell, ſince deceaſed, widow and aſſignee of the ſaid Andrew Anderſon, and the other appellants his repreſentatives, to have it declared that the gift in favour of Anderſon was expired, and that all Bibles and other books contained in the gift to the reſpondent, and printed by the ſaid Agnes Campbell or the repreſentatives of Anderſon, ſince the expiration of the gift to him, ſhould be con- fiſcated in terms of his gift; and that they might be diſcharged to print any more of ſuch books or to ſell thoſe already printed. It was inſiſted for Agnes Campbell, that the gift made by Queen Anne was granted to Freebairn alone; but he not having qualified himſelf for the ſaid office by taking the oaths required by law, the gift became void, and he could not communicate the benefit of it to any other perſon whatſoever. That the grant to Free- bairn was during the ſubſiſtence of the former grant to Anderſon; and that the grant to Freebairn, under which the reſpondent claimed, was by expreſs words recalled *and voided* in a ſubſequent grant to him by King George the Firſt. The Lord Ordinary having made a report of the cauſe, the Court, on the 17th of July 1716, "found, that the reſpondent's intereſt and title by the gift "did not fall or become irritate by Mr. Freebairn not qualifying "within three months of the date of the gift; and alſo repelled "the defence, that after the ſaid firſt gift to Freebairn he ob- "tained a ſecond gift; and alſo repelled the defence that the ſaid

" firſt gift was granted, before expiring of the former gift in fa
" vour of the ſaid Agnes Campbell, the ſaid firſt gift to Freebair
" being to commence at the iſſue or expiration of the ſaid fo
" mer gift."

It was afterwards contended that the reſpondent himſelf ha not qualified according to law; but he inſiſting that he had qu lified within the time limited by the act of 1 Geo. 1. c. 13., t Lord Ordinary on the 19th of July " repelled the allegation, ar " decerned and declared, that the reſpondent, as one of his m " jeſty's printers, might print Bibles and acts of parliament, a " other public papers, and ſell and diſpoſe of them in any pa " of his majeſty's united kingdom or elſewhere; and declar " the gift in favour of Andrew Anderſon and his heirs expire " and decerned the ſaid Mrs. Anderſon and the appellants h " grandchildren to deſiſt from any new impreſſion, or furth " printing of any Bibles, acts of parliament, and other pap " concerning the Government, or ſelling the ſame, from a " after the 1ſt of July 1715."

1 Geo. 1. c. 13.

Pending this laſt action, the king granted a new patent being king's printer in Scotland to the ſaid Mrs. Anderſon, and the appellant Baſkett; but ſhe died ſoon after. Baſkett and repreſentatives of Mrs. Anderſon produced the new patent to Court and claimed the benefit thereof, and prayed that the ri under the ſame, and the right to that under which the reſponde claimed, might be diſcuſſed and ſettled before any judgment giv But the Court, on the 14th of December 1716, " Ordained " reſpondent's decree to be extracted, but prejudice to the pellant Baſkett to inſiſt on the new gift in his favour as cords." Baſkett and the other appellants afterwards brou an action of reduction to make void the gift under which reſpondent claims; and then they preſented a petition, (in the f mer action) complaining of the before mentioned interlocuto but the Court, on the 18th of December 1716, " refuſed the de " of the petition, reſerving the appellant's right by the new g " as accords."

Entered, 22 March 1716-17.

The appeal was brought from " an interlocutor or decree " the Lord Grange in Scotland, made the 8th of February 17 " and the affirmance thereof by the Lords of Seſſion the 17th " June 1715, and alſo from another interlocutor or decree of t " Lords o Seſſion of the 17th of July 1716; and alſo from anoth " interlocutor or decree of the ſaid Lord Grange, the 19th of t " ſame July, whereby his lordſhip decerned and declared, amon " other things, ' That James Watſon, as one of his majeſty " printers, might print Bibles and acts of parliament, and oth " public papers, and ſell and diſpoſe of them in any part of h " majeſty's united kingdom or elſewhere;' and alſo from tw " other interlocutors of the ſaid Lords of Seſſion of the 14th a " 18th of December 1716."

Heads of the Appellants' Argument.

The patent to Mr. Freebairn, under which the reſponde claims, contained ſeveral very illegal clauſes: particularly it gav th

e patentee a liberty and privilege of printing and importing ibles from beyond ſea, which is contrary to all good policy, and of ery dangerous conſequence. It contains a power of confiſcation or forfeiture of all books printed or imported contrary to the privilege granted by that patent, and gives the half of the penalties to the patentee; but this ſeems to require the warrant of an expreſs law, and not to be impoſed without the authority of the legiſlature. It grants the ſole privilege of printing all books of law, viz. the municipal laws of Scotland, which is entirely illegal and againſt the juſt liberty both of authors and printers, which by no law in Scotland is reſtricted, as to books of law, more than as to books of divinity or medicine, or any other ſcience. Theſe and ſeveral other illegal clauſes are contained in this patent, and no ſooner was it granted, but they were complained of, and a reference was made to Sir James Stewart, then Lord Advocate, who reported the ſaid patent, upon theſe and other reaſons, to be abſolutely void and null, which ſhould either oblige the patentee to renounce and ſurrender the ſame, or at leaſt ſubject it to be reviewed and reſcinded, and ſo make place for another, more legal and warrantable. His majeſty has accordingly granted a patent to the appellant Baſkett, and to Mrs. Anderſon, under whom the other appellants claim, avoiding that formerly granted to Mr. Freebairn.

It is the conſtant practice and cuſtom of the Court of Seſſion, not to determine in favour of any grant, when another appears and pleads a better right, till they once hear both parties; for it is otherwiſe prejudicing the one party by giving judgment unheard: and the rather in this caſe, becauſe the reſpondent having brought his action to have his grant eſtabliſhed, the appellants pleaded this new grant as a ſeparate and total defence to that demand.

Mr. Freebairn being the only patentee, and not having taken the oaths within the time limited by law, the gift became void, and the office fell, and therefore he could not communicate the ſame, nor any of its conſequences; and though he aſſigned a third part to Watſon before the time in which he ſhould have taken the oaths, yet the title to the office was imperfect and incomplete in the perſon of Freebairn until he ſhould take the oaths; but he never having done that, the right reſolved and became void from the beginning.

Suppoſing Mr. Freebairn's grant were good, it was againſt reaſon to decree a confiſcation of all books to the reſpondent alone, ſince the appellant Baſket has by his own ſhewing an equal ſhare in that grant with the reſpondent.

By the decree the reſpondent is declared to have right to print Bibles, &c. and to diſpoſe of and ſell the ſame in any part of his majeſty's united kingdom. This is directly contrary to and inconſiſtent with the patent granted to the king's printers in England, whereby all perſons are prohibited to import any Bibles into England.

Heads

Heads of the Reſpondent's Argument.

The ſaid Freebairn was only a truſtee for the reſpondent as one third of the grant; and the reſpondent cannot by the laws Great Britain incur any forfeiture by Freebairn's delinquenc not only becauſe Freebairn was neither convicted nor the ti elapſed for taking the oaths. No new grant can be legal duri the ſubſiſtence of a former grant. The reſpondent, for a valual conſideration of 300*l.* paid to Freebairn before ſuch delinquenc had a grant of one third in the intereſt of the ſaid former pate and hath alſo expended 2000*l.* for carrying on the ſaid emplc ment for the benefit of the public. But Baſkett, who has a gra of the office of king's printer in England, and who farms t Univerſity preſs in that country, ſeeks by this preſent appeal engroſs the whole trade of printing the *word of God* in Scotla alſo, which, if he prevail in, it will make Bibles, New Teſt ments, and Common Prayer Books very ſcarce and dear, havi already raiſed the price ſome 60 per cent. And in further p judice of the reſpodent's right he has aſſumed to himſelf in l late editions of Bibles and Common Prayer Books the ſtile King's Printer for Great Britain.

The appellants' aforeſaid action of reduction is not yet ripe f the determination of the Houſe of Peers, till the ſame have had previous and judicial determination in Scotland.

Judgment, 25 Feb. 1717-18. After hearing counſel, *It is ordered and adjudged, that t ſaid interlocutor of the 19th July 1716 be ſo far varied as th the words after-mentioned, viz. "in any part of his majeſty's unit "kingdom or elſewhere," be omitted, and that the ſaid interlocut or decree as to all other parts thereof, as alſo the ſeveral other in terlocutors complained of in the ſaid appeal be affirmed.*

For Appellants, *Spencer Cowper. Sam. Mead.*
For Reſpondent, *Tho. Lutwyche. Rob. Raymond.*

John Schaw, of Greenock, Bart. - *Appellant*; Case 46.
Dame Margaret Schaw, alias Houſton, and Sir John Houſton, Bart. her Huſband, - *Reſpondents.* Bruce, 15 July 1715.

10th *March* 1517-18.

Tailzie—A father infeft in an eſtate in life-rent, and a ſon infeft in fee, jointly entail the eſtate in the ſon's contract of marriage, with prohibitory, irritant, and reſolutive clauſes, and with a proviſo, that the father and ſon ſhould jointly have power to alter; this entail was inſert in the regiſter of tailzies upon the joint ſupplication of the father and ſon, but no reſignation was made nor infeftment taken thereon: the irritancies and clauſes not to alter were binding upon the ſon (after the father's death) even ſuppoſing the ſubſtitution were gratuitous.

IN 1686, Sir John Schaw, Bart. deceaſed, father of the appellant and reſpondent Dame Margaret, ſettled his eſtate of Greenock upon himſelf in life-rent, and failing him to the appellant and the heirs male of his body in fee, whom failing to the other perſons therein mentioned; reſerving a jointure to the appellant's grandmother of about 72*cl.* per annum, and about 150*l.* per annum to his mother, and a power to the father to raiſe 50,000 merks for younger childrens' portions, and to make leaſes for his life and 19 years after at one-third leſs than the then rent.

A marriage being afterwards agreed upon between the appellant and Margaret, the daughter of Sir Hew Dalrymple, Lord Preſident of the Seſſion, by their contract of marriage in March 1700, entered into with the ſpecial advice and conſent of their reſpective fathers and mothers, who are parties thereto, and ſubſcribe the ſame, the ſaid Sir John the father, and the appellant, in conſideration of the marriage and of the portion of the ſaid Margaret Dalrymple, bound and obliged themſelves jointly and ſeverally with mutual conſent to reſign their lands and eſtate therein particularly mentioned; viz. the lands and barony of Greenock, and alſo the lands of Broadſtain and others, (which laſt were not contained in the ſettlement of 1686) to Sir John the father in life-rent, whom failing to the appellant and the heirs male of his body by that or any future marriage; whom failing to his five younger brothers ſucceſſively and the heirs male of their bodies, whom failing to the heirs male of Sir John the father's body, by his then or any future wife; whom failing to the reſpondent Margaret and *the heirs of her body*; with ſeveral other ſubſtitutions of heirs, whom all failing to the heirs and aſſignees whatſoever of the appellant. The deed contained the uſual prohibitory, irritant, and reſolutive clauſes againſt the appellant and the heirs of entail, and clauſes to the following effect:

Reſerving power to Sir John the father, and the appellant, during their joint lives, with mutual conſent, to alter or diſcharge any of the ſaid prohibitory and irritant clauſes and conditions as they ſhould jointly think fit; and to alter the ſaid courſe of ſucceſſion, except in ſo far as concerned

concernea the proviſions thereby conceived in favour of the ſaid Margaret Dalrymple, &c.

Provided, that out of Sir John the father's life-rent, there ſhould be particularly excepted and reſerved to the appellant for his and his wife's preſent maintenance, lands of the yearly value of 6000 merks, to be increaſed as they ſhould have children:

And Sir John, the father, thereby renounced his power of charging the eſtate of Greenock with 50,000 merks for his childrens' portions, and all the other powers, which he had reſerved by the ſettlement in 1686; and, his wife Dame Eleanor, with his conſent, gave up her life-rent in the ſaid eſtate of Greenock, to which ſhe was entitled by her contract of marriage:

And in regard the heirs female of the appellant's body, failing heirs male thereof, were thereby excluded from the right of ſucceſſion to the ſaid eſtate, there was a particular proviſion of 50,000 merks made for their portions.

There were two parts of the ſaid contract executed by all the parties in preſence of the then Lord Chancellor of Scotland, and above 40 other lords and gentlemen, who all of them ſubſcribed their names as witneſſes thereto: but no reſignation was made, or charter and ſaſine taken out thereupon. Upon a petition, however, in the name of Sir John the father, and the appellant, ſigned by Sir David Cuninghame, uncle to the appellant's wife, their procurator, the Court of Seſſion ordered the contract to be recorded in the regiſter of entails purſuant to act of parliament; and it was therein regiſtered accordingly, and the deed returned to the appellant.

The appellant's father having died, and alſo his five younger brothers without iſſue, and the reſpondent Margaret then ſtanding the next ſubſtitute failing iſſue male of the appellant, the reſpondents brought an action before the Court of Seſſion againſt the appellant, to compel him to exhibit the ſaid contract of marriage, to the end that it might be ordered to be regiſtered in the books of Seſſion, and the reſpondents have an extract thereof. The appellant brought a counter action againſt the reſpondents to declare his right to alter the ſucceſſion, and diſpoſe of the property as he ſhould think fit, as to all others except the heirs of the marriage; upon the ground, that notwithſtanding theſe prohibitory clauſes, yet he, as having the fee of the eſtate veſted in him long before the ſaid marriage-ſettlement, and being the firſt maker of the entail, could not be tied up by them, but might ſtill alter the ſaid order of ſucceſſion, and cut off all other ſubſtitutes, except the heirs of the marriage, for whoſe ſecurity the contract was treated for and made.

In the debate ariſing on both theſe actions, it was at firſt alleged for the appellant, that the ſaid contract of marriage was his own proper evident, wherewith he might do as he pleaſed, and that therefore he was not obliged to produce the ſame, before it ſhould appear on the event of the action, that the reſpondents had a right to require the exhibition and regiſtration thereof. The reſpondents made anſwer, that Dame Margaret being expreſsly nominated

nominated in the entail, which was a contract and conveyance of lands, ſhe had good right to call for production thereof, to the end the ſame might be preſerved. The Court thereupon "Or-"dered the appellant to exhibit, reſerving all defences againſt "regiſtration or any other legal effect."

The contract being accordingly exhibited, after various proceedings, the Court at firſt, on the 22d of February 1715, "Found that the irritancies in the appellant's contract of mar-"riage did not affect the appellant who made the tailzie, and "therefore declared in favour of the appellant, ſo far as con-"cerned the lands contained in the charter and infeftment "1686."

The cauſe, however, being re-heard upon the petition of the reſpondents, the Court, on the 15th of July 1715, "Found that "the irritancies and clauſes not to alter contained in the contract "of marriage were binding upon the appellant who made the "tailzie, even ſuppoſing the reſpondent Dame Margaret were a "gratuitous ſubſtitute." The reſpondents having then applied to the Court to have the appellant's counter action diſmiſſed, their lordſhips, on the 30th of July 1715, "Found the tailzie "a delivered evident, and ordained the contract containing the "ſame to be regiſtered in the books of Council and Seſſion, that "any concerned might take extracts thereof, and aſſoilzied the "reſpondents from the appellant's declarator."

The appeal was brought from "an interlocutor of the Lords of "Seſſion the 15th of July 1715, and alſo from an interlocutor of "the ſaid Lords of Seſſion, dated the 30th of the ſame July." Entered, 29 March 1717.

Heads of the Appellant's Argument.

It is certain, that before the ſaid marriage-contract, the appellant was poſſeſſed in fee ſimple of the eſtate intended to be tailzied, and the interlocutors appealed from ſuppoſe the tailzie to be grtuitous or voluntary with reſpect to the reſpondent. That a tenant in fee ſimple could ſettle the order of his ſucceſſion by tailzies as he thought proper, by the law of Scotland, was not doubted; nor was it doubted that he could alter ſuch entail whenever he would: but of late men were not contented to ſettle their eſtates by way of entail, changing the order of ſucceſſion from the heirs at law, to any other heirs; they proceeded to add conditions or limitations for reſtraining their heirs from altering the order ſettled by ſuch entails, and that if the heirs of entail ſhould do contrary to ſuch conditions, their right ſhould become irritated. Theſe clauſes are called prohibitory and irritant clauſes, but it ſtill remained a queſtion till the year 1685, whether ſuch irritant and prohibitory clauſes expreſſed in tailzies did limit the heirs of entail and bar them from altering the ſucceſſion or charging with debt. But it is remarkable that throughout the act 1685, c. 22. the legiſlature had no view to abridge the power known to belong by the law of Scotland to makers of tailzies, of altering the deſtination or order of their own ſucceſſion, but only 1685, c. 22.

to

to make their own deſtinations the more effectual by confirming what limitations ſoever the makers ſhould think fit to impose upon their heirs. So that, at preſent, tailzies in Scotland, ſo far as concerns the maker's power of altering are regulated, by the principles of the common law of that country; but in as far as relates to the reſtrictions and limitations of the fee in the perſons of the heirs of entail, tailzies are regulated by the above recited act 1685.

That the maker of a gratuitous or voluntary tailzie has power to alter it at pleaſure by the law of Scotland, is evident; 1ſt, Becauſe tailzies, as they regard the makers of them, are really deſtinations of ſucceſſion, which by the known principles of the civil law, copied in that particular by the law of Scotland, are alterable at the pleaſure of him who made the deſtination; nothing being more common than that a variety of accidents ſhould with juſtice alter his intentions before his death, it was judged neceſſary, as well as expedient, to provide that a man ſhould not have it in his power to deprive himſelf of the faculty of ſettling his ſucceſſion as he ſhould find proper by any previous voluntary deed. This fundamental maxim of the civil law, in matters of ſucceſſion, the law of Scotland has admitted univerſally, with one exception, and that is where a ſettlement is made for an onerous cauſe; in ſuch a caſe, the law of Scotland looks upon the tailzie to be in effect a contract, which juſtice obliges the performance of, and therefore does not allow the maker to alter at pleaſure.

2d, As this poſition is agreeable to the principles above eſtabliſhed, ſo it is the unanimous opinion of all the writers on that ſubject: the learned Hope, in his Leſſer Practicks, lays it down for certain, that a bond of tailzie *ex nulla cauſa oneroſa* is revocable, but admits that it is binding, if it be granted for an onerous cauſe, or in view of a mutual tailzie. And Lord Stair, in his Inſtitutes, b. 2. tit. 3. § 59. agrees in the ſame opinion, with this difference, that though a tailzie be made for an onerous cauſe, yet if that conſideration were not adequate to the tailzie, it may be altered. Of the ſame opinion are the other lawyers who treat of this ſubject.

Hope.

Stair's Inſtit.

Dirleton's Doubts and Stewart's Anſwers, p. 146, 147.

The appellant ſupports their opinion by the deciſions of the Lords of Seſſion in two important caſes, lately determined, where the Judges were unanimous. The firſt was, the caſe of Lord Lindores againſt Oliphant and Stewart. The other caſe was that of Scott of Harden againſt Scott of Raeburn. Both theſe caſes do incontrovertibly ſupport the reaſons inſiſted upon by the appellant, and prove, that the firſt maker of an entail cannot by any clauſes be tied up from the power of diſpoſing of his inheritance as againſt all voluntary ſubſtitutes.

Ld. Lindores againſt Oliphant and Stewart, Dalrymple, 8 Dec. 1714. Bruce, 28 Feb. 1715. Scott of Hardin v. Scott of Raeburn, a ſubſequent caſe in this Collection.

But further, as the maker of a tailzie muſt, from the nature of that ſettlement, be poſſeſſed of a faculty of altering it, the appellant conceives, that he having by the deed now in queſtion reſerved to himſelf the fee of the eſtate according to the law of Scotland, and as the property does ſtill abſolutely remain with

e appellant, the power of alienation muſt likewiſe remain with
n. It is true, that if the appellant had made himſelf life-renter,
: could not have pretended to the power of alienation, becauſe
e fee in that caſe would have been lodged in another; and it is
ually true, that an heir of entail limited with uſual clauſes,
annot alter: but neither of them is the caſe here; the appellant
as and ſtill is abſolute fiar.

Heads of the Reſpondents' Argument.

There is nothing plainer than that, as a man having an unli-
mited fee or property, may diſpoſe thereof at pleaſure; ſo he
may leſſen or reſtrain his own right in favour of another, and
what is granted to that other, is as much his property as what re-
mains with the firſt proprietor. It was indeed in the appellant's
power to have joined in making this entail or not; but when he
had joined in making thereof, whereby the eſtate is limited, for
want of heirs male, to the reſpondent Dame Margaret by name,
with prohibitory and irritant clauſes, not only upon the heirs of
entail, but expreſsly upon the appellant himſelf, he and all the
heirs of entail are thereby bound up and diſabled from making
any alteration therein, whereby the appellant's right or property,
which was before free and unlimited, is become limited. There
are here not only the ordinary prohibitory and irritant clauſes,
but an expreſs obligation on the appellant and all his ſubſequent
heirs to ſtand ſeiſed and poſſeſſed by virtue of that contract and
by no other title. But, beſides, it appears in this caſe, that Sir
John Schaw, the appellant's father, was tenant for life in poſſeſ-
ſion, with the reſervation of a jointure for his lady; ſo that the
appellant was not proprietor of the whole fee ſimple; and the
appellant's father and mother joined in this ſettlemettt, and there-
by made a preſent proviſion for the appellant and his lady, which
they could not have had, without the father and mother's join-
ing; and therefore the appellant ought to be bound by the terms
and agreements of the deed in which they joined.

The appellant contended, that by the contract of marriage,
the fee was veſted in him, whom all the heirs therein mentioned,
or whoever might ſucceed to the ſaid eſtate, muſt repreſent, and
therefore could not controvert, but muſt fulfil his deeds; and in
caſe of the appellant's contravention, no perſon could be ſerved
heir, for that the next in ſucceſſion muſt be ſerved heir to him,
(which would be abſurd, for that he had loſt his right) and not
to his father, for he was denuded. But this argument *de abſurdo*
is of no validity; for, as to the queſtion, whether the appellant
be bound or not by his contract, it is to be determined without
regard to what might fall out. And if the appellant ſhould con-
travene, upon an action brought againſt him by the next in ſuc-
ceſſion, he would be decreed to denude, and adjudication would
follow thereupon in favour of the next heir of entail, by virtue of
the obligation in the ſettlement for that purpoſe.

The ſtatute 1685 gave a liberty to perſons to tailzie their eſtates,
and burden their heirs as they thought fit, which before then had
been

been controverted, as if a perſon could not burden heirs that were not in being; and the deſign of the ſtatute was to prevent that objection. But it was never brought in queſtion, either before that ſtatute or ſince, whether a preſent and abſolute proprietor could tie up himſelf as he thought fit; and the act of parliament does no way relate to that matter.

The entail is in a contract of marriage, whereof there were two parts ſubſcribed and mutually interchanged and delivered: and the ſame was regiſtered in the regiſter of entails, by decree of the Lords of Seſſion, upon a ſupplication of the appellant and his father, mentioning to be for the benefit of all parties therein concerned: and this being a complete contract, and having the force and effect of a delivered evident or deed, there was no diſtinction either as to the grantor or grantees, whether the ſame was completed by charter and ſaſine or not, ſince the power to alter did not ariſe from this, that it was but a perſonal obligation, but from the nature of the thing, for whatſoever the charter and ſaſine could do, the perſonal obligation had, by the law of Scotland, the ſame effect againſt the grantor to oblige him to fulfil; and with reſpect to the grantor's power of altering, there is no difference whether it was completed by charter or not; and the appellant might as well have altered the ſucceſſion as to his five brothers, were they now living, as to think of doing it to the prejudice of the reſpondent.

The preference given to the reſpondent Dame Margaret by the ſaid contract of marriage had been fully concerted and agreed to by all parties, and was what her father had ſtipulated for her, and not the mere voluntary deed of the appellant. For by Sir John her father's ſettlement in 1686, while the appellant was a minor, he, the appellant, had not a free and unlimited fee in the ſaid eſtate of Greenock, the ſame being conſiderably qualified and burdened by the father: but all theſe qualifications and burdens were by her ſaid father, in the contract on the appellant's marriage, renounced and given up; and conſequently what was thereby provided in her favour was a plain agreement between father and ſon, whereby her father prevailed with his ſon to prefer her to his own daughters in the ſucceſſion, and that for valuable conſiderations.

Theſe valuable conſiderations were; That by the ſettlement 1686, the eſtate in queſtion ſtood charged with the value of about 13,000 merks for a jointure to the appellant's grandmother, and about 150*l.* per annum to his mother, who are ſtill living, and with a power to Sir John the father to raiſe 50,000 merks for younger childrens' portions: Sir John the father had likewiſe a life-rent in the whole, and a power to make leaſes for his life, and nineteen years after, at one-third leſs than the then rent, whereby he might have raiſed fines. By the preſent ſettlement that power of making leaſes is diſcharged, and from the date thereof an immediate proviſion of 322*l.* ſterling per annum is made for the appellant, with a covenant therein to add more to it, as his children ſhould increaſe, and other lands included to the

the value of 100*l.* ſterling, which were not compriſed in the former ſettlement, and to which the appellant had no other right: and, beſides, Sir John, the father, had a perſonal eſtate of 20,000*l.* ſterling, which he might have diſpoſed of at his pleaſure, as he ſoon afterwards did to the appellant, the proſpect whereof was a further inducement to the appellant to join in this entail, and to ſettle the ſucceſſion as his father deſired.

After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the ſaid interlocutors therein complained of be affirmed.* Judgment 10. March 1717-18.

For Appellant, *David Dalrymple. Rob. Raymond. Will. Hamilton.*

For Reſpondents, *Tho. Lutwyche. Sam. Mead.*

This caſe ſeems to be inaccurately reported in the Dictionary, vol. 2. p. 431. *voce* Tailzie.

Sir Peter Fraſer of Doors, - - - - *Appellant;* Caſe 47.
Iſabel Sandilands, Widow of William Black Eſq; - - - - - - *Reſpondent.*

12th *Jan.* 1718-19.

Preſumption.—A perſon being ſued in 1715. by the widow of one to whom, in 1697, he had granted a bond of penſion for the conſideration of managing the grantor's law affairs; though never demanded by the grantee during his life, the bond is ſupported and the money decerned for.

Holograph.—Whether holograph or not being referred to the oath of the grantor of a bond, the term is circumduced againſt him for not deponing.

Coſts.—40*l.* coſts given againſt the appellant.

IN July 1697 the appellant granted a bond of penſion to the late Mr. Black, advocate, the reſpondent's huſband, of 10*l.* ſterling per annum, to be paid at Whitſunday and Martinmas by equal portions, with intereſt after the reſpective terms of payment. The bond mentioned the conſideration to be for Mr. Black's pains and management of the appellant's law affairs, and that it was to continue ſo long as the appellant had any law affairs. In July 1713, Mr. Black aſſigned the ſaid bond to the reſpondent in truſt for his children.

In 1715 the reſpondent, after her huſband's death, brought an action againſt the appellant before the Court of Seſſion for payment of the ſaid bond and intereſt; ſtating that Mr. Black did, from the time of the date thereof till his death in Auguſt 1713, carefully manage all the appellant's law ſuits and other his affairs, but that neither the ſaid penſion, nor any part thereof, had been paid to him: and that the reſpondent, after her huſband's deceaſe, applied ſeveral times by herſelf and friends for payment of

the money due upon the ſaid bond, but the appellant always de clined payment. The appellant contended that the bond wa null, the writer and witneſſes not being mentioned and deſcribe therein. The reſpondent anſwered, that the bond being hol graph of the appellant, the deſignation of the writer and witneſſ was not neceſſary; and inſiſted that the appellant ſhould be oblige to confeſs or deny whether it was holograph or not. On th 27th of June 1716, the Lord Ordinary "ſuſtained proceſs upo "the bond libelled, on the reſpondent's proving the ſame holo "graph; and ordained the appellant to confeſs or deny the fac "againſt the 15th day of July then next, under the certificatio "contained in the act of ſederunt." No appearance having bee made for the appellant, the Lord Ordinary, on the 18th o July 1716, "Held him as confeſſed, and decerned in terms o "the libel."

The appellant afterwards preſented a repreſentation, ſtating that he had been abroad ſeveral years, and had not had any law affairs, and that Mr. Black had been paid ſeveral ſums of money on account of the appellant's law ſuits, which ought to be de ducted from the ſaid bond, and that the ſame never having bee demanded, was to be preſumed to have been paid. The reſponden anſwered, that if Mr. Black had meant to re-call the bond h ſhould have given notice to the reſpondent's huſband, that h might have been at liberty to take other buſineſs: and that i 1713 her huſband had gone on the appellant's requeſt to his houſe 100 miles from Edinburgh, to ſettle ſome of his affairs, and tha no preſumption of payment could lie to a bond of this nature The Lord Ordinary, on the 25th of July 1716, "Adhered to th "former interlocutor, but ſuſtained the foreſaid defence of pay "ment as relevant to be proved *ſcripto* of the ſaid deceaſed Mr "Wm. Black, or payment to the reſpondent ſince Mr. Black he "huſband's death relevant to be proved *ſcripto vel juramento* o "her the reſpondent *cum onere expenſarum* in caſe the appel "lant ſuccumb, and aſſigned the 6th of November next for prov "ing in the terms above mentioned." The appellant reclaimed but on the 31ſt of July, their lordſhips "Adhered to the former interlocutors, and refuſed the deſire of the appellant's petition." And on the 16th of November 1716 the Court "Circumduced "the term againſt the appellant for not proving payment, and "decerned and ordained the appellant to make payment and ſa "tisfaction to the reſpondent of the ſaid ſum of 10*l.* of yearly pen "ſion from the 12th of July 1697 to the term of Lammas 1713 "and of the intereſt of each moiety of the ſaid penſion from the "term of payment thereof to the term of Lammas 1713 "which being accumulated into one total ſum was declared to "amount to 2821*l.* 2*s.* 6*d.* Scots, and in like manner to make "payment and ſatisfaction of the intereſt of the ſaid penſion "from the aforeſaid term of Lammas 1713, in time to come "during the not payment thereof."

Execution being ſued out upon this decree, the appellan brought a bill of ſuſpenſion; and, after diſcuſſing the ſame, th Court

Court, on the 12th of July 1717, "Refuſed the bill, and adhered "to their former interlocutor."

The appeal was brought from "a decree of the Lords of Seſ- "ſion of the 16th of November 1716, and an interlocutor of "the 12th of July 1717, and ſeveral other interlocutors." Entered 23 Dec. 1717.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the decrees and interlocutors therein complained of be affirmed; and it is further ordered, that the appellant do pay or cauſe to be paid to the reſpondent the ſum of* 40*l. for her coſts in reſpect of the ſaid appeal.* Judgment, 12 Jan. 1719.

For Appellant, *Abel Ketelbey. Geo. Leſhe.*
For Reſpondent, *Rob. Raymond. Will. Hamilton.*

James Blackwood, of London, Merchant, *Appellant*; Caſe 48.
John Hamilton of Grange, - - *Reſpondent.* Forbes, 17 July, 1713.

26th *Jan.* 1718-19.

Tenor.—The Court of Seſſion having reduced a decree of proving the tenor of a bond, and an adjudication and decree of mails and duties following thereupon, for the reaſon that it was not proved who were the writer and witneſſes: the judgment is, from the circumſtances of the caſe, reverſed, the reaſons of reduction repelled, and the adjudication ſuſtained.

Damage and Intereſt.—The Court, in an interlocutor prior to thoſe appealed from, having ſuſtained the adjudication for the principal ſum and intereſt, *without all accumulation, penalties, and expences whatſoever*, this latter part of their judgment is reverſed.

IN 1679, Robert Blackwood, late merchant in Edinburgh, the appellant's father, deceaſed, brought an action before the Court of Seſſion, againſt Alexander Hamilton of Grange, the reſpondent's uncle, then a minor, for payment of a bond, ſtated to have been granted by John Hamilton of Grange, deceaſed, the father of ſaid Alexander, and Jane his wife, in the following manner: that John Hamilton and Jane his wife being indebted to the ſaid Robert Blackwood in 1719*l.* Scots, they on the 24th of March 1674, granted him a promiſſory note for payment thereof; but the note not being paid when it fell due, the ſaid John and Jane, on the 7th of September 1674, inſtead thereof, granted a bond to the ſaid Robert Blackwood, whereby they obliged themſelves, their heirs, &c. to pay 1000*l.* Scots, part of the ſaid debt, at Candlemas then next, and 719*l.*, the reſidue thereof, at Whitſunday thereafter, with intereſt of the ſaid principal ſum from the date thereof, and a penalty of 300*l.* Scots in caſe of non-payment. And the ſaid action alſo contained a concluſion againſt the minor for payment of a debt of 228*l.* 2*s.* 7*d.* Scots, ſtated to have been incurred by his father and mother after the date of the ſaid bond. In this action the ſaid Robert Blackwood obtained a decree of conſtitution in abſence againſt the

minor for payment of the ſum contained in the bond, and alſo fo the ſaid other ſum of 228*l.* 2*s.* 7*d.* Scots.

Robert Blackwood alſo brought an action againſt the ſaid Jan the relict, and Richard Elphinſton her then huſband, for paymen of the ſums before mentioned, in virtue of a promiſe made by her after the death of her firſt huſband, to pay the ſame: and i this action he alſo obtained decree; but this decree was onl to take effect againſt the ſaid Jane, but not againſt her thei huſband.

On the 14th of February 1680, the appellant's ſaid father alſ obtained a decree of adjudication againſt the ſaid Alexande Hamilton as heir to his father, whereby the lands and barony o Grange, and other lands therein mentioned were adjudged fo payment of the ſaid ſums then accumulated to 2780*l.* Scots.

Robert Blackwood afterwards brought an action before the Court of Seſſion againſt the ſaid Alexander Hamilton, for proving the tenor of the ſaid bond, which he ſtated to have been produced in one of the ſaid actions, and left in the hands of Mr. Mackenzie, one of the clerks, and to have been accidentally loſt by a fire which happened in or near Mr. Mackenie's office. On the 4th of June 1698 the Court "Found the tenor of the ſaid "bond ſufficiently verified and proved, and decerned that the "copy thereof inſerted ſhould have the ſame force and effect as "if the bond were extant."

In Auguſt 1701 the ſaid Robert Blackwood, the appellant's father, conveyed the ſaid debts and decrees to one George Clerk; and this Clerk, in November 1704, conveyed the ſame to the appellant. And the appellant brought an action of mails and duties, againſt the reſpondent (ſon of John Hamilton, deceaſed, a younger brother of the ſaid Alexander, who entered to the poſſeſſion of the ſaid eſtate after the death of his uncle and father) then a minor, and his tenants of the premiſes; and decree was obtained for payment of the rents to the appellant and another creditor upon the ſaid eſtate equally; and thereupon the appellant gave theſe tenants a charge of payment.

The reſpondent and his curators afterwards perceiving that the bond, which was the foundation of all the decrees before mentioned, as the tenor thereof was proved by the appellant's ſaid father, wanted writer's name and witneſſes, for which blanks were left in the decree for proving the tenor; they therefore brought an action againſt the appellant before the Court of Seſſion for reducing the ſaid bond and decrees following upon it. In this action they ſtated that the decree of conſtitution in 1679 was obtained in abſence againſt Alexander the minor, who had neither tutors nor curators, nor any guardian aſſigned to him, not only for the ſum in the bond, but alſo for another ſum, being the value of merchant goods; and ſo little care was taken in this affair of the minor, that though the purſuer in that cauſe did not prove that the goods were furniſhed, yet judgment was given againſt the minor for them, becauſe the purſuer referred the furniſhing to the minor's oath; and that though in law he could not depone,

yet

et. He was holden as confeſt, and judgment therefore given againſt him. They ſtated alſo, that the action was brought againſt Jane the widow, and Elphinſton her ſecond huſband, not becauſe ſhe had executed the bond, but becauſe ſhe had during her widowhood promiſed to pay the debt. In this action, the appellant made defences, and the Court, at firſt, upon report of Lord Cullen Ordinary, on the 12th of February 1713, "Repelled the reaſons "of reduction proponed againſt the ſaid decree of conſtitution, "and ſuſtained the adjudication foreſaid againſt the heir (there "being no competition of creditors) for the principal ſum and "intereſt without all accumulation, penalties, and expences "whatſoever."

The reſpondent reclaimed, and the Court ordered the original probation made uſe of in the action for proving the tenor of the bond, with the decree therein, to be laid before them; and having conſidered the ſame, the Court, by an interlocutor on the 26th of June 1713, by a majority of one vote "Found it not proved, that "the bond had writer's name and witneſſes ſubſcribing, and "therefore found the tenor as proved null, and reduced the ad-"judication following thereon." The appellant reclaimed, and the Court again, by a majority of one vote, on the 17th of July 1713, "Refuſed the deſire of the petition, and adhered to their "former interlocutor."

The appeal was brought from "ſeveral interlocutors of the Lords "of Seſſion in Scotland of the 26th of June and 17th of July "1713, and of ſo much of the interlocutor of the 12th of February "1713 as takes away the accumulations, penalty, and expences." Entered, 1 Dec. 1727.

Heads of the Appellant's Argument.

There never was the leaſt exception againſt the juſtice of this debt; when the decree of conſtitution was obtained againſt the ſaid Alexander, the bond was produced and was ſufficient to prove the ſaid debt, and needed not any further proof by his oath: and the paſſive title which ſubjected him to the payment thereof was alſo proved without his oath; for he was lawfully charged to enter himſelf heir to his father within the time preſcribed by law, viz. 40 days; and his tutors and curators were duly ſummoned, and he or they for him, not refuſing or renouncing his being heir to his father, the decree againſt him proceeded upon that preſumed paſſive title, according to the conſtant practice in ſuch caſes.

The decree of adjudication was alſo had againſt him before the bond was loſt, and became a real charge upon the eſtate: and the decree for proving the tenor of the bond did not paſs of courſe on contumacy of abſent parties, but upon mature and ſolemn conſideration of the whole Court in preſence, and upon as full and pregnant proofs and other corroborating evidence as could poſſibly be expected or were ever required in a caſe of the like nature. 1ſt, By the debt-book or ledger of the ſaid Robert Blackwood the appellant's father, wherein was a memorandum of his own

hand-writing, that he had received a ticket or promiſſory note, written by the ſaid John Hamilton the grandfather, and ſigned by him and his lady, and that he had afterwards received the ſaid bond in place thereof, particularly expreſſing the manner and times of payment, and that Patrick Mac Gregor, and Alexander Campbell, ſervants to the ſaid John Hamilton, were witneſſes thereto. 2d, By the decree of conſtitution againſt the ſaid Alexander Hamilton, wherein the ſaid bond is mentioned to have been produced, and it is not to be ſuppoſed, that the Court would have given judgment thereon if it had wanted the writer's name or witneſſes. 3d, By the decree in the action againſt the ſaid Jane the relict, who appeared and made defence, wherein the bond was alſo produced, and if thoſe requiſite eſſentials had been wanting, her lawyers muſt doubtleſs have taken notice thereof. 4th, By the depoſitions of ſeveral credible witneſſes, who proved the *caſus amiſſionis* by fire.

After pronouncing the interlocutor of the 26th of June, the appellant prayed the Court either to reverſe the ſame, or to allow him to amend his libel, or exhibit a new one, which was then offered, expreſſing the ſaid John the grandfather to be the writer and his ſaid two ſervants hereinbefore named to be the witneſſes, which had been omitted in the ſaid former libel, either becauſe his father's lawyers did not think it needful, or were not appriſed of the ſaid memorandum in his debt-book or ledger: but the Court refuſed the deſire of the appellant's petition.

Heads of the Reſpondent's Argument.

For preventing of frauds in deeds, there are ſeveral acts of parliament in Scotland, directing and requiring, that all deeds and ſecurities ſhould have certain ſolemnities, which are ſo eſſential, that if the deeds ſhould be without them, they are declared to be
1593. c. 179. void and null. By an act of parliament, 1593, c. 179., it is expreſsly enacted, "that all original chartours, &c. ſall make ſpe-
"cial mention in the hinder end thereof, before the inſerting of
"the witneſſes therein, of the name, ſurname, and particular re-
"maining place, dioceſie, and uther denomination of the writer
"of the body of the foreſaid original writtes and evidentes;
"utherwiſe the ſame to make na faith in judgement, nor out-
"with in time cumming."

From this act it was inſiſted for the reſpondent, that the foundation of the three ſeveral judgments was the bond, pretended to have been given by the reſpondent's grandfather; but this bond not being produced, it was neceſſary to conſider that which was decreed to ſtand in its place, viz. the tenor thereof which had been proved in the action for that purpoſe. The bond ſo proved wants the name and deſignation of the writer, and witneſſes, and therefore it is void by the foreſaid act of parliament. If that were not the caſe, then every perſon who hath a defective or null bond, or other deed, may throw it away, and allege it is loſt, and offer to prove a tenor, wanting writer's name and witneſſes,

(which are the ſolemnities for preventing of frauds,) and thereby carry off a man's eſtate, to which otherwiſe they had no manner of pretence.

The appellant contended, that ſince in the firſt decree obtained upon the ſaid bond, expreſs mention was made, that the original bond was produced, the law preſumed, ſince a judgment was obtained upon it, that the ſame was formal and valid. But the preſumption runs quite the other way, viz. that the bond was then the ſame thing it now appears to be in the tenor proved; and if ſo, then it was null. But if the principal bond was unexceptionable, then the tenor is not proved; or if it wanted writer and witneſſes, as the tenor proved does, then it is void. But ſuppoſing there had then been a formal good bond produced, yet there being no ſuch formal bond extant, the decree falls to be reduced for want of the neceſſary grounds and warrants; beſides, no argument is to be drawn from a judgment obtained againſt a minor who is *indefenſus*.

As no memorandum in a man's own books can make up the ſolemnity of a deed granted to him, ſo this very memorandum does not cure the preſent evil, ſince there is no mention of the writer; the want of which is one of the nullities of the bond.

The decree was not given againſt the widow upon this bond, but upon her promiſe to pay the debt during her widowhood; ſo that the merits of the bond never were in queſtion in that action.

If the appellant think the bond was good, he may ſtill go on to prove the tenor of a good bond *de novo*; nor will that be any inconveniency, ſince all the witneſſes are ſtill alive.

After hearing counſel, *It is ordered and adjudged that the ſaid ſeveral interlocutors of the 26th of June and 17th of July* 1713, *and ſo much of the ſaid interlocutor of the 12th of February* 1713, *as takes away the accumulations, penalty, and expences complained of in the ſaid appeal be reverſed; and as to the other part of the laſt mentioned interlocutor, the ſame is hereby affirmed.* Judgment, 26 Jan. 1718-19.

For Appellant, *Rob. Raymond.* *George Leſſie.*
For Reſpondent, *Tho. Lutwyche.* *Will. Hamilton.*

The judgment here reverſed is given as a precedent in the Dictionary of Deciſions, vol. 2. *voce* Tenor, p. 444.; and in Bankton, b. 4. tit. 29. § 6. Erſkine, however, b. 4. tit. 1. § 57. was aware of this reverſal.

In Fountainhall, 14 June 1707, a deciſion, *Trotter* v. *Home*, is reported, which ſeems of a contrary nature to the judgment of the Court below, in the preſent caſe: there, though the writer and witneſſes could not be proved, the Court ſupported a bond.

Case 49. Dalrymple, 21 Dec 1714. 3 Feb. 1715. Bruce, 3 & 19 Feb. 1715.

Katherine Stevenſon, and Mr. James Gillon, Advocate, her Huſband, - - *Appellants;*

Gilbert, Mary, and Eupham Fife, Children of Gilbert Fife deceaſed, late one of the Baillies of Edinburgh, - - - *Reſpondents.*

20th *Feb.* 1718-19.

Heritable and moveable.—A bond taken to a man and his wife in life-rent, and to their daughter in fee, and failing her by deceaſe to the huſband, his heirs, executors, or aſſignees; found to be moveable, that being but one ſubſtitution.

Tutor and Pupil.—A tutor having taken a heritable bond, in corroboration of a perſonal one payable to the pupil and her iſſue, whom failing to three aunts, her neareſt in kin *nominatim*; it is found that he acted warrantably.

Succeſſion.—The three aunts having neither confirmed nor ſerved themſelves heirs, but one of them, who ſurvived, being according to the tenor of the ſaid heritable bond entitled thereto, aſſigned the ſame: in a queſtion between the aſſignees and the heir, who was *then* alſo neareſt in kin of the deceaſed pupil, the aſſignation is ſupported.

ALEXANDER STEVENSON, merchant in Edinburgh, deceaſed, on the 17th of December 1668, lent to Walter Young of Winterfield, the ſum of 7000 merks Scots, and took from him a bond for that ſum, payable to the ſaid "Alexander Stevenſon "and Katherine Wilkie his wife, and longeſt liver of them two "in life-rent, and to Suſanna Stevenſon, their lawful daughter "in fee; and failing her by deceaſe, to the ſaid Alexander Ste- "venſon, his heirs, executors, or aſſignees." Alexander Stevenſon died inteſtate in February 1669, leaving his daughter and only child Suſanna, an infant about 14 months old. His widow and three ſiſters, Chriſtian, Suſannah (married to Gilbert Fife, one of the bailies of Edinburgh), and Margaret, alſo ſurvived him and he left a nephew and niece, Alexander Stevenſon and the appellant Katherine, children of a deceaſed brother.

Gilbert Fife, being appointed tutor to the ſaid Suſannah the infant, on the 6th of January 1671, took an heritable bond of corroboration from Walter Young the debtor, obliging him to pay the ſaid ſum to Katherine Wilkie the mother in life-rent, and to the ſaid Suſannah Stevenſon her daughter, and to the heirs lawfully to be procreated of her body; whom failing, to Chriſtian, Suſanna, and Margaret Stevenſon, her aunts, ſiſters to the ſaid Alexander Stevenſon deceaſed, equally amongſt them, and to the ſaid Gilbert Fife, huſband to the ſaid Suſanna, for his intereſt, and to the heirs lawfully procreated or to be procreated of the ſaid three ſiſters their bodies; and failing of any of them by deceaſe without heirs of her body, and not making lawful diſpoſition of their ſhares, then the portion of the deceaſing ſiſter or ſiſters to accreſce to the ſurviving. Upon this heritable bond infeftment was taken.

Suſanna

Suſanna the infant died about the age of four years, and her aunts Chriſtian and Suſanna having alſo died without iſſue, and without making any diſpoſition of their ſhares, Margaret the ſurvivor, in January 1704, conveyed all her right and intereſt in and to the ſaid bonds to George Denniſton, in truſt for the reſpondents, who were children of Gilbert Fife by a ſecond wife, but no relations of the Stevenſons. Denniſton afterwards conveyed the ſame to the reſpondents. Margaret, the ſurviving aunt, took up the ſucceſſion by virtue of the perſonal ſubſtitution to her in the ſecond bond, and never made up any title by confirmation or ſervice.

The creditors of Walter Young having brought an action of ranking and ſale of his eſtate of Winterfield, the reſpondents appeared and claimed the ſaid debt by virtue of the titles before mentioned. But in this they were oppoſed by the appellants, Katherine and her huſband, claiming right through her brother Alexander Stevenſon, the nephew and heir of the ſaid Alexander Stevenſon deceaſed. Alexander Stevenſon jun. being indebted to his ſiſter Katherine in the ſum of 8500 merks Scots as her mariage-portion, the appellants charged him to enter heir to his uncle, and the daughter Suſanna, in the ſaid original bond, and thereupon brought an adjudication, in which they obtained decree in December 1710.

A competition thereupon enſued between the appellants and reſpondents with regard to the right to the ſums due by Walter Young. On the part of the appellants it was contended, that the original bond contained a gradual ſubſtitution of heirs, and was therefore heritable as to the ſucceſſion; and that the tutor of Suſanna could not innovate the firſt bond in prejudice of the heir. The Court at firſt by an interlocutor, on the 17th of December 1714, "Found that the original bond conceived in favour "of Suſanna Stevenſon was heritable, and found that the innovation of the ſecurity by Suſanna's tutor in prejudice of the "ſucceſſion of the heirs could take no effect, and therefore preferred the appellants for the ſums due by the original bond, as "coming in the right of Suſanna's heirs."

The reſpondents reclaimed againſt this interlocutor, and after anſwers for the appellants, the Court, on the 3d of February 1714-15, "Having fully conſidered the caſe with the original bond "granted by Walter Young to Alexander Stevenſon, in which "bond there is but one ſubſtitution to Suſanna Stevenſon, fiar of "the ſums therein, viz. to the ſaid Alexander Stevenſon, his "heirs, executors, or aſſignees; found, that upon the death of "Suſanna, the ſucceſſion by the original bond would have devolved upon the executors of Alexander Stevenſon, who were "his own ſiſters, from whom the reſpondents derive right." The appellants reclaimed, and as no title by ſervice or confirmation had been made up by the ſiſters, the appellant Katherine offered to make up a title in her perſon by confirming herſelf executor: the reſpondents made anſwer, and the Court, on the 19th day of February

February 1714-15, "Adhered to their former interlocutor, but "remitted to the Lord Ordinary to hear parties' procurators, "upon this point, viz. If the ſucceſſion by the original bond "would have devolved upon the executors of Alexander Steven- "ſon, if the appellants confirming, or as executors *deſignative*, "ſerving heirs of proviſion before extract could be preferred to "the reſpondents, they not having ſhewn any right by confirma- "tion or ſervice."

Parties were accordingly heard before the Lord Ordinary, who made report thereof, and the Court, on the 7th of July 1715, "Found that the tutor could not in his adminiſtration alter the "ſucceſſion deſigned by the original bond; but that he acted "warrantably by taking the foreſaid corroborative right, ſubſti- "tuting thoſe perſons *nominatim* who were neareſt of kin to "Alexander Stevenſon, and might have confirmed themſelves "executors to Suſanna Stevenſon the pupil." And to this interlocutor the Court adhered on the 19th of the ſame month of July.

Entered, 8 Dec. 1717.

The appeal was brought from "ſeveral interlocutors of the "Lords of Seſſion of the 3d and 19th days of February 1714-15, "and of the 17th and 19th days of July 1715."

Heads of the Appellant's Argument.

By the laws and cuſtom of Scotland, every bond that has in it a gradual ſubſtitution of heirs, is conſidered to be heritable, ſeeing it neceſſarily requires a ſervice of the heir as a title to it: and this is expreſsly laid down by the learned Lord Dirleton upon the word *Tailzie*, where he ſays, that a bond like the preſent "is heritable in reſpect of the tailzie foreſaid; there "being no tailzie of moveables or moveable ſums. And the "proviſion in favour of heirs with the ſubſtitution foreſaid, is "equivalent as if executors were expreſsly excluded." And this point was lately determined by the Court of Seſſion, 19th February 1714, in the caſe of Walker and Simpſon. The original bond in this caſe, therefore, ſhould be looked upon as heritable, *quoad* the ſucceſſion, ſeeing it contained ſeveral degrees of ſubſtitution: and although there had been but one degree of ſubſtitution, yet that very ſubſtitution or entail made the bond heritable as to the ſucceſſion, and ſo to belong to the heir, and not to the executor.

Dirleton, voce Tailzie.

But though the bond were moveable, and not heritable, and ſo part of the perſonal eſtate, and as ſuch to deſcend to the executors of Alexander Stevenſon, the original creditor; yet the ſame muſt now belong to Alexander Stevenſon jun. the heir at law, and his ſiſter Katherine the appellant, they being at preſent the next of kin to Alexander Stevenſon deceaſed, (who died inteſtate,) the original creditor, and his daughter Suſanna: and, conſequently, all their eſtate, effects, goods, and chattels, both heritable and moveable, by the law of Scotland belonged to the appellant Katherine and her brother, none of the three ſiſters o

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deceaſed Alexander, aunts to the appellants, having made up title in their lifetime, by getting themſelves confirmed executrs dative as neareſt in kin to the deceaſed.

It would be a thing of dangerous conſequence to countenance ſuch a practice in tutors, that during the infancy of their pupils, they might take upon them to alter the ſettlement made by the anceſtors of the pupil contrary to their intentions: and without this the reſpondents have no title.

It is ſtill more unfavourable in the preſent caſe, where the tutor has made ſuch alterations in favour of himſelf and his children, to the prejudice of the right heirs; he having by his indirect practices endeavoured to defraud the true heirs of the ſum of money in diſpute, and to veſt it in his own children, the reſpondents, who are entire ſtrangers in blood to Alexander Stevenſon, the original creditor, and Suſanna his daughter.

Heads of the Reſpondents' Argument.

The original bond was certainly moveable, and to be held as perſonal eſtate: for to make a bond heritable, executors muſt either be excluded from the ſucceſſion, or there muſt be a ſeries of gradual ſubſtitution; eſpecially if joined with this, that the ſucceſſors who have the right of blood are cut off, and the ſucceſſion is ſettled upon one who could not ſucceed otherwiſe than by virtue of the expreſs proviſion in the ſubſtitution. But none of theſe occur in the preſent caſe, for failing of Suſanna the fiar, the bond is conceived expreſsly to Alexander the father, his heirs, executors, or aſſignees, and Suſannah having died an infant, the bond muſt be reckoned as much moveable as if the father had taken the bond ſimply to himſelf, his heirs, executors, or aſſignees, which without all queſtion would have gone to executors. It is not the addition of the words *which failing*, that makes a bond heritable; for theſe words, though not adjected, are implied in all bonds: as when a bond is taken to A. B., his heirs, executors, or aſſignees; that differs in nothing from a bond taken to A. B., *which failing*, to his heirs, executors, or aſſignees.

The plain intention of the ſaid Alexander Stevenſon who lent the money was, that having only one daughter Suſanna, the bond was taken as a proviſion for her, and deſigned to belong to her, her huſband, and children, in caſe ſhe lived to have any; but failing of that event, the bond was to return to the ſame ſtate as if her name had never been mentioned, viz. to Alexander Stevenſon, his heirs, executors, or aſſignees, on the plain terms of an ordinary moveable bond. 2dly, Since the bond was conceived to Suſanna, without mentioning her heirs, or executors, and yet was deſigned for her as a portion; it could not be imagined, that the father's deſign was to exclude the children of Suſanna, and prefer his own other heirs or executors to them: In caſe Suſanna had had children it would have gone to them as executors, becauſe ſhe being fiar, and no mention made of heirs, or executors in the bond, the caſe would have been the ſame thing, as if the bond had been granted to her ſimply, which by the

the nature of the thing (money being a moveable ſubject,) would have belonged to her executors; and, therefore, ſince by the plain preſumed intention of Alexander Stevenſon the bond was moveable in the perſon of Suſanna, he not having made mention of her heirs, but taken it ſimply to her, and ſo left it to deſcend to her executors, conform to the common diſpoſition of law, it could never be claimed by any perſon as her heir. 3dly, Suppoſing that Suſanna herſelf was only to have right, and not her heirs nor executors, yet the reſpondents' caſe would be equally ſtrong if not ſtronger, becauſe where a right is taken ſimply to a perſon' ſelf and not to their heirs, but to other ſubſtitutes, that perſon' right reſolves entirely into a life-rent; and then the caſe would have been the ſame as if the bond had been taken to Suſanna in life-rent, and to Alexander Stevenſon, his heirs, executors, or aſſignees, in fee, in which caſe it was plainly moveable. 4thly Suppoſing the bond had been heritable in the perſon of Suſanna yet ſo ſoon as the ſucceſſion devolved upon the laſt ſubſtitute, viz to Alexander Stevenſon the father, his heirs, executors, or aſſignees, then the bond became a ſimple moveable bond, as if it had been conceived at firſt to Alexander, his heirs, executors, or aſſignees.

The firſt bond being by its conception moveable, the tutor acted very warrantably by taking the ſecond corroborative bond and ſubſtituting therein the ſame perſons *nominatim* who were neareſt of kin to Alexander the father, and might have confirmed themſelves executors to Suſanna the pupil.

There was no occaſion for the aunts confirming themſelves executors, becauſe the tutor ſaved them that trouble and expence by taking the bond to them *nominatim*, which if the tutor had not done, they infallibly would have made up their own title by confirming themſelves executors immediately upon Suſanna's death and though a tutor could not by any deed of his alter the courſe of his pupil's ſucceſſion, yet he could ſo far meliorate the condition of his pupil, and his pupil's ſucceſſors, as to ſave them the trouble of a ſervice or confirmation by taking the right to theſe perſons *nominatim*, who would have ſucceeded by virtue of the general word executors in the firſt bond. So that thus the ſubſtitution taken *nominatim* to Alexander's executors, (on whom the right devolved) eſtabliſh the title ſufficiently in the perſons of theſe executors: and the reſpondent's derive their right from them.

Judgment, 20 Feb. 1718-19. After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the ſaid ſeveral interlocutors complained of be affirmed.*

For Appellants, *Rob. Raymond.* *Will. Hamilton.*
For Reſpondents, *David Dalrymple.* *Tho. Lutwyche.*

Iliam Ayton Eſq; - - - *Appellant;*
me Margaret Colvill, Widow of Sir John Ayton of Ayton, and Robert and Andrew Ayton their Sons, - - - - *Reſpondents.*

Caſe 50.
Fountainhall, 23 Feb. 1706.
18 July 1710.
Dalrymple, 27 Nov. 1716.

23d *Feb.* 1718-19.

Repreſentation.—An eldeſt ſon of a marriage is retoured *legitimus et propinquior hæres* to his father *cum beneficio inventarii*. In the inventory he gives up not only the lands ſettled upon him in his mother's contract of marriage, but alſo certain other lands; and afterwards brings a reduction of the proviſions in a ſecond contract of marriage, alleging, that he was only heir of proviſion in virtue of his mother's contract of marriage, and as ſuch might ſtill quarrel his father's deeds, the narrative of the retour deſigning him heir procreated between a certain man and woman; it is found, that he was ſerved heir of line to his father, and as ſuch could not quarrel any of his father's deeds.

BY contract of marriage in 1670, between Sir John Ayton, the appellant's father, and Mrs. Magdalen Stewart, daughter of Sir William Stewart of Invernity, the appellant's mother, Sir John Ayton the grandfather, obliged himſelf to reſign and ſurrender his eſtate of Ayton, and certain other lands, in favour of Sir John his ſon, and the heirs male to be procreated betwixt him and the ſaid Mrs. Magdalen Stewart, whom failing to his heirs male of any other marriage, whom failing to his heirs, and aſſignees whatſoever, reſerving a life-rent of part of the eſtate to the grandfather and his lady. In terms of this contract a crown charter was obtained, and infeftment taken by the appellant's father in 1671: and in 1672 that charter and inſtrument of ſaſine were ratified and confirmed in Parliament. In 1684, the appellant's mother died, leaving him the only child of that marriage.

In 1701, Sir John the appellant's father, married the reſpondent Dame Margaret ſiſter of the Lord Colville his ſecond wife. By the contract upon that marriage, Sir John provided the ſaid Dame Margaret in the life-rent of one half of the eſtate ſettled upon the heirs of the firſt marriage, and alſo in the life-rent of one half of the eſtate of Kincraigie, (not contained in his firſt contract of marriage); and he ſettled the fee of that eſtate of Kincraigie, to the children to be begotten of the ſecond marriage; and further bound himſelf and his heirs to pay to the ſaid children the ſum of 2222*l.* 4*s.* 5*d.* ſterling, with intereſt after they arrived at the age of ſeven years. Thereafter Sir John conveyed to his children, the reſpondents Robert and Andrew Ayton, the ſum of 1333*l.* 6*s.* 8*d.* ſterling, of perſonal eſtate; and left his debts to be paid by the appellant. The appellant ſtates, that theſe debts amounted to 4000*l.* ſterling; and that the yearly income of the eſtate deſcending to him did not exceed 300*l.*, of one half whereof the reſpondent Dame Margaret was to enjoy the life-rent.

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Sir John the father died in 1703; and after his death the appellant was ſerved heir in ſpecial to him *cum beneficio inventarii*, in the lands and barony of Ayton. The words of the ſervice were "Qui jurati dicunt, quod quondam Dominus Joannes Ayton de "eodem, pater Magiſtri Gulielmi Ayton nunc de eodem pro-"creat inter illum et Magdalenam Stewart, ejus primam "Sponſam, latoris præſentium obijt ultimo veſtit. et ſaſit. "&c. et quod dict. Magiſter Gulielmus Ayton eſt legitimus et "propinquior hæres dict. demortui Joannis Ayton ſui patris de "omnibus et ſingulis prædict. terris, &c. cum beneficio In-"ventarij ſecundum actum Parliamenti, &c." In the inventory given up by the appellant, after the ſervice, he not only ſpecified the lands contained in the firſt contract of marriage, but alſo the eſtate of Kincraigie and lands only mentioned in the 2d marriage contract. In 1705, the appellant brought his action of reduction, improbation and declarator before the Court of Seſſion againſt the reſpondents, for ſetting aſide the grants and proviſions made by his father in favour of the lady and children of the ſecond marriage, as exorbitant, and as being done, to the prejudice of the firſt marriage ſettlement, and of the appellant as heir of the firſt marriage.

The reſpondents made defences, that whatever the proviſions in their favour were the appellant could not queſtion them, becauſe he was ſerved heir general to his father, and thereby ſo repreſented him that he could not call in queſtion any deeds done by him.

The Court on the 18th of July, 1710, "Found that the ap-"pellant was ſerved heir of line to his father, and remitted to "the Lord Ordinary to proceed accordingly." The appellant reclaimed againſt this interlocutor, and after ſundry proceedings, the Court on the 11th of July 1716, "Found that the appellant was "ſerved heir of line to his father, and that as ſuch he could not "quarrel any of his father's deeds and aſſoilzied the reſpondents."

Entered, 17 Jan. 1717-18.

The appeal was brought from "two interlocutory ſentences and "decrees of the Lords of Seſſion of the 18th of July 1710, and "11th of July 1716."

Heads of the Appellant's Argument.

The eſtate the appellant claims was ſettled upon him both by his father and grandfather in his mother's marriage ſettlement, which was completed by charter and ſaſine, and could not be voided by any gratuitous deed of his father.

The proviſions given by the appellant's father to his ſecond wife and her children were very exorbitant, being far beyond what his circumſtances could bear; and the reſpondents enjoy an opulent fortune, whereas the appellant has not bread, but by the favour of his father's and grandfather's creditors, from whom he has a ſmall allowance yearly, until the event of this appeal be known.

An heir ſerved in ſpecial to a certain eſtate whereof his predeceſſor died poſſeſſed, and whereof the ſucceſſion was provided to him

him by a marriage ſettlement or other deed, is to be underſtood heir of proviſion and not heir general; and therefore not liable for deeds done to the prejudice of the heir of proviſion; and the appellant's ſervice pointed him out heir of proviſion upon his mother's marriage ſettlement as being William Ayton, now of Ayton, and the ſon of Sir John Ayton by Magdalen Stewart his firſt wife.

The reſpondents contended, that by the words *legitimus et propinquior hæres* the appellant was ſerved heir general, and ſo liable univerſally to all his father's debts and deeds. But all briefs directed forth of the Chancery in Scotland, to warrant the inqueſt to ſerve heirs, are formed in general and uniform terms without making any diſtinction what ſort of heir is to be ſerved, or upon what title the ſervice is to proceed, and the return of the inqueſt anſwers the propoſitions of the brief regularly, and in like general terms. The additions of the return of the inqueſt, viz. *Hæres proviſionis vel Talliæ*, are only of late uſed though required by no law, it does not follow therefore that every heir ſerving as *legitimus et propinquior hæres* is heir general, becauſe that diſtinction muſt appear from the heir's claim, or from the title of his predeceſſor, and not from the modern additions in the retour of the inqueſt. The words *legitimus et propinquior hæres* muſt be underſtood *ſecundum ſubjectam materiam*, viz. If of an heir of entail it is underſtood *hæres ſecundum talliam*; if of an heir of proviſion, by a contract or marriage-ſettlement, it is underſtood *hæres proviſionis virtute contractus matrimonialis*. And although the words *hæres proviſionis* be not added to the retour of the appellant's ſervice, yet the reſpondents cannot thence conclude, that he is not heir of proviſion, or that he is liable to all his father's deeds as heir general; for it is certain that the only title Sir John, his father, had to his eſtate, was the ſurrender thereof made to him by Sir John the grandfather in his marriage-ſettlement, whereby the fee is provided to the appellant, and therefore his ſervice as heir to his father muſt be as heir of proviſion in right of that marriage-ſettlement. Beſides, the appellant knew that he had conveyed his other real and perſonal eſtate to the reſpondents, the children of the ſecond marriage, and that they were poſſeſſed of the ſame, and conſequently nothing remained for him to be ſerved heir to, but what was provided to him by the marriage-ſettlement; ſo that his ſervice muſt be circumſcribed by the nature of the inveſtiture upon which the inqueſt made their retour.

If the appellant had been ſerved *legitimus et propinquior hæres maſculus virtute contractus matrimonialis*, then the Court would have retrenched the exorbitant proviſions made to the children of the ſecond marriage; and notwithſtanding his ſervice was general, wanting the words *virtute proviſionis*, &c. that did not alter the caſe, ſince where there is a ſpecial proviſion by marriage-ſettlement, the law is anxious to preſerve the firſt ſettlement from being voided by any poſterior deed, eſpecially a ſecond marriage-ſettlement. So that it is not ſo much the perſon that the law takes notice of, whether he be heir general or not, but the deed that is done in fraud of the firſt marriage-ſettlement, and whether

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the party ſerved heir be entitled to the proviſions of that ſettlement. For, here the ſubtlety of law, that *hæres eſt eadem perſona cum defuncto* muſt yield to this undoubted principle both of law and equity, that he who has bound himſelf by a marriage-ſettlement, which is always onerous as to the heir of the marriage, cannot voluntarily and gratuitouſly evacuate that firſt ſettlement; and it is certain, that ſo far as proviſions in a ſecond marriage-ſettlement are exorbitant they are gratuitous; and there were ſeveral precedents of the Lords of Seſſion in the like caſe. It is not to be imagined that the appellant would make up a title, in order to give up to the children of the ſecond marriage the proviſions made by his grandfather in his favours, by his mother's mariage-ſettlement; and though by that ſettlement he was entitled to the eſtate, yet it was neceſſary for him to be ſerved heir before he could call in queſtion ſuch deeds as were done by his father, tending to diſappoint his ſucceſſion, but that ſervice gave him no further title to the eſtate than he had formerly.

The reſpondents contended, that it further appeared that he was ſerved heir general, becauſe in the inventory given up by him he had included the lands of Kincraigie, which were not ſettled upon him by his mother's marriage-contract, as well as the eſtate to which he was entitled by that contract. But the giving up inventory to the ſheriff of the ſhire did not alter the nature of the ſervice: the claim for the ſervice recited that the appellant was to be ſerved heir *cum beneficio inventarii* conform to act of
1695, c. 24. parliament 1695, and that act requires no inventory to be made up at the time of the ſervice; but only requires that ſuch inventories, when made up, containing the whole eſtate of the deceaſed, ſhould be recorded before the ſheriff in the ſhire where the eſtate lies; and that they be again recorded in books, appointed by the Court of Seſſion, that creditors may know what eſtate belonged to their debtor at the time of his death, and that his heir ſerving *cum beneficio inventarii* might be no further liable to his debts than the value of the eſtate in that inventory. The making of ſuch inventory, therefore, could never ſubject the appellant to the gratuitous debts and deeds of his father; and more eſpecially in the preſent caſe, for this reaſon, that Mr. Colvill, who formed the appellant's claim, and the retour of his ſervice as the ſheriff's clerk, and made up the inventory, neglected to order the ſame to be recorded in the books of Seſſion, whereby the appellant loſt the benefit of that law, and made no uſe of the inventory. And as the appellant had no benefit by giving up inventory of the lands of Kincraigie, it cannot ſubject him to the gratuitous debts and deeds of his father.

Heads of the Reſpondents' Argument.

The deſcription of the appellant by his father and mother could not be any evidence that he was only to be ſerved heir, as claiming a particular proviſion by the marriage-articles for that deſcription was equally proper to a general ſervice as heir of line, and is proper, if not neceſſary, in all ſervices. Had the intention been only

only to ſerve the appellant heir of proviſion by virtue of his mother's marriage-contract, there had been no occaſion for mentioning her to be the *firſt* wife, becauſe an heir of proviſion has right to that proviſion, whether his mother be firſt or ſecond wife: but ſince he was to be ſerved heir of line, it was neceſſary to find, that his mother was the firſt wife, becauſe otherwiſe he could not have been ſerved heir of line. Though in the recital of the ſervice he is deſcribed as ſon of his father by Magdalen Stewart, his firſt wife, yet in the ſervice itſelf and retour of the jury, he is only found *legitimus et propinquior hæres*, without referring to the marriage-articles or any other proviſion whatſoever, which could never have been done had the ſervice been as heir of proviſion as the appellant contends.

Nor does it alter the caſe, that the infeftment upon the contract of marriage, whereby it appeared that the lands were ſettled upon the appellant as heir male of the marriage, was produced; for the appellant being both heir of line and heir of the marriage, he might very well be ſerved heir of line, as he was, whereby, beſides his right to the lands provided to him by his mother's marriage-contract, he made a title to all other lands his father died ſeiſed of.

It was likewiſe the appellant's intention to ſerve himſelf heir of line; for otherwiſe he muſt have confined himſelf to the lands ſettled by his mother's marriage contract; but this he did not, for amongſt the lands given up in the inventory, and to which he claimed right to ſucceed by virtue of this ſervice, are contained the lands of Kincraigie. Theſe were no part of the ſettled eſtate; and yet the appellant would now pretend, that he was only ſerved heir of proviſion, which could never entitle him to thoſe lands of Kincraigie, which were not ſettled upon him. This is likewiſe confirmed from this, that the appellant brought an action, as heir to his father to avoid and ſet aſide a conveyance made of theſe lands to the reſpondents, the minors, by their father; but this could not be as heir of proviſion, for theſe lands are not contained in the ſettlement, and conſequently he muſt have conſidered himſelf as heir general or heir of line.

When an heir has made up his right or title as heir of line, he hereby becomes by law univerſally liable to the payment of all the debts, and performance of all the deeds of the perſon to whom he is heir. The law never will allow him, after ſubjecting himſelf to that univerſal repreſentation, to avoid any of his predeceſſor's deeds, eſpecially where they are for valuable conſiderations, as the demands of the reſpondents are; being ſecured by articles before marriage, in conſideration thereof and of a marriage-portion paid. And therefore ſince the appellant's ſervice does give him a right to all his father's real eſtate, as well as that provided to him by his mother's marriage-contract, the conſequence muſt be, that he muſt be as univerſally liable, as his title gives him an univerſal right; and therefore he is tied up from queſtioning the deeds in favour of the reſpondents made by his father, whom he thus claims under. This has always been the

uninterrupted opinion of all lawyers, and thus the judges have determined.

Judgement, 23 Feb. 1718-19. After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the two interlocutors therein complained of be affirmed.*

For Appellant, *Ja. Stuart, Tho. Lutwyche, Hum. Henchman.*
For Reſpondents, *Rob. Raymond, Will. Hamilton.*

Vide the caſe Home *v.* Home, No. 15. of this Collection. One remarkable difference between that caſe and the preſent is, that here the ſon in the inventory, (which nevertheleſs is ſaid to have had no effect for his benefit) gave up lands which were not ſettled upon him by his father's contract of marriage. In the caſe of Home *v.* Home, there were no lands to ſucceed to but thoſe contained in the contract of marriage, and ſettled upon the heir.

Caſe 51. Fountainhall, 28 Feb. 1710. Forbes, 23 June 1713.

William Scott of Raeburn, an Infant, by his Guardians, - - - - - *Appellant*;
Walter Scott of Harden, alias Highcheſter, an Infant by his Guardians, - - *Reſpondent.*

9th *March* 1718-19.

Tailzie—A perſon receives right to an eſtate from his father, and the ſon afterwards executes a procuratory of reſignation for an entail of the eſtate, with prohibitory and irritant clauſes, to himſelf in life-rent and to his father in fee, and failing of him to the heirs male to be procreated of his own body, and failing them to other heirs of entail: This procuratory was regiſtered in the regiſter of Tailzies, and inhibition uſed againſt the grantor, but no charter or ſaſine taken thereon: It is found, that there being no antecedent onerous cauſe for making this entail, eſpecially in favour of heirs to be begotten and born, and ſeeing it remained in the terms of a perſonal right, without being perfected by charter or ſaſine, it was revocable by the maker thereof, with conſent of his father the firſt inſtitute.

SIR William Scott, the elder, of Harden, in the county of Berwick, had two ſons, William and Robert, and two brothers, Gideon Scott of Highcheſter, (the reſpondent's great grandfather,) and Walter Scott of Raeburn, his youngeſt brother, (the appellant's great grandfather).

In March 1673, upon the marriage of William the ſon (who was then alſo Sir William) with Jane Niſbet, daughter of Sir John Niſbet of Dirleton, Sir William the elder bound himſelf to ſettle the lands of Harden and others on Sir William the ſon, and the heirs male of his body of that marriage, whom failing to the heirs male of his body of any other marriage, whom failing to his heirs and aſſignees whatſoever. In 1674, a deed was executed by Sir William the father in terms of the ſaid obligation, upon which infeftment was taken by Sir William the ſon.

In

In May 1686 Sir William the ſon executed a procuratory of ſignation for a new entail of his eſtate; at the date of executing is procuratory, Sir William the ſon was under the diſpleaſure the Government, and neither he nor his brother Robert had y iſſue; and the Earl of Tarras, ſon of Gideon Scott of High-eſter, (who would have ſucceeded to the eſtate, failing iſſue of William the ſon and his brother Robert,) ſtood forfeited for aſon. By the ſaid procuratory of reſignation Sir William the " for the well and ſtanding of his houſe and family, and continuance thereof in the ſurname of Scott, and for certain good and onerous conſiderations, bound and obliged himſelf, his heirs and ſucceſſors, to make due and lawful reſignation of his eſtate in the hands of the ſuperior in favour and for new inſeſtments thereof to be given to Sir William Scott the elder of Harden, his father; whom failing to the heirs male to be procreated by himſelf of his then preſent or any future marriage; whom failing to Robert Scott his brother, and the heirs male of his body; whom failing to William Scott of Raeburn," (the appellant's grandfather,) and the heirs male of is body; whom failing to the other heirs of entail therein mentioned, " the deſcendants of Sir Gideon Scott of Highcheſter deceaſed, both male and female, being always upon great and weighty conſiderations excluded and debarred from the ſucceſſion in all events." By this deed Sir William Scott the younger ſerved to himſelf his own life-rent of the whole entailed lands, d power to provide for a ſecond lady by a jointure not exceeding 220*l.* 4*s.* 5*d.* ſterling per annum, and the children of ſuch cond marriage with portions not exceeding 1666*l.* 13*s.* 6*d.* rling. It contains a proviſo, that it ſhould not be lawful to the id Sir William Scott the father, and the other heirs of entail, alter the ſame or the order of ſucceſſion, and in caſe any of em ſhould attempt it, the deed ſhould be void, and the perſon doing ſhould forfeit his right, and the next in ſubſtitution ould be at liberty to enter; and it alſo contains a clauſe, that e ſame ſhould be valid, though it ſhould not be delivered by the antor in his lifetime, but ſhould be found amongſt his writings ter his death.

No charter or infeftment followed upon this procuratory; but, the abſence of Sir William Scott, the younger, from the king-m, his father in January 1691, ſent the ſaid procuratory to Ir. Menzies, his agent, (who had drawn the ſame,) with a miſſive tter, deſiring him to regiſter it with all convenience and ſecu-ty, for delays might prove dangerous. And Mr. Menzies, in ly ſame year, preſented a petition to the Lords of Seſſion for ir William Scott the elder, and the other members of the entail, aying that the ſame might be regiſtered in the regiſter of enils appointed by act of parliament, which was accordingly or-red and done. Sir William Scott the elder, Robert Scott his cond ſon, and William Scott of Raeburn (the appellant's grand-ther,) the three perſons firſt named in the entail, uſed inhibition ſo in 1691 againſt Sir William Scott the younger, to prevent his

making any deed in prejudice of the entail. Theſe ſteps were taken without the privity of the grantor, when he was out of the kingdom, and ſeveral years before his return.

After his return to Scotland, in 1698, the father and ſon executed a deed, reciting, That though Sir William Scott the younger had for particular reaſons at the time ſubſcribed the deed of 1686, yet the ſame was left to be further conſidered by him, and no ways to be made uſe of but when and as he ſhould think fit; nevertheleſs that it was in his abſence and without his order put into the public regiſter, he being at that time out of the kingdom, and ſince both he and his father were reſolved to diſcharge and make void the ſaid deed, to the end that their ſucceſſion might either run in the tenor of the former infeftments of their eſtate, or be ordered by a new ſettlement of the ſaid Sir William the ſon; therefore they expreſsly declared the ſaid deed of 1686 to be void and null, and that the ſucceſſion to the eſtate ſhould by no means be regulated thereby: and the ſaid Sir William the father did thereby repone and reſtore the ſaid Sir William the ſon in his full right and place of the premiſes as before the making of the ſaid tailzie, which he for himſelf and all the other heirs of entail perpetually renounced in his favour.

In 1699 Sir William, father and ſon, raiſed an action of reduction improbation before the Court of Seſſion againſt the heirs of entail for reducing the deed of 1686; in this action the defenders did not appear, and decree of certification was obtained, declaring that the deed ſo reduced if produced in any Court was to be looked upon as falſe and forged, and to bear no faith.

For ſome time no new ſettlement of the eſtate was made; but, in 1705, Sir William the ſon executed a new entail of the eſtate, proceeding upon the recital, that "Whereas I have a plentiful eſtate "conveyed to me from my progenitors of the ſurname of Scott, "which I am reſolved to tranſmit and continue in the ſaid name "of Scott, for the laſting well and ſtanding of my family in the "ſaid name in all time coming;" therefore he ſettled his eſtate to himſelf and the heirs male of his body, whom failing to his brother Robert and the heirs male of his body, whom failing to the reſpondent (grandſon of the ſaid Earl of Tarras, who was ſon of Gideon Scott, the ſaid Sir William's eldeſt uncle) and the heirs male of his body, whom failing to Walter Scott of Raeburn (the appellant's father) and the heirs male of his body, whom failing to certain other heirs therein mentioned: reſerving a power to Sir William the grantor to alter this entail. The principal difference between this and the deed of 1686, was, that the deſcendants of the Earl of Tarras, who were totally excluded in the former deed, were by this latter deed called to the ſucceſſion in preference to the Raeburn branch.

Sir William Scott the father, Sir William the ſon, and his brother Robert, having died without iſſue male, the appellant was ſerved heir to his grandfather William of Raeburn, the perſon next called to the ſucceſſion by the deed of 1686; and thereupon an action was brought by him and his guardians before the Court

Seſſion againſt the reſpondent and his guardians, for reducing and voiding the deed of revocation executed by Sir William Scott elder and younger, and the ſaid decreet of certification, and alſo for avoiding the ſecond entail. In this action the appellants inſiſted that the deed of revocation was void, becauſe neither father nor ſon apart nor jointly had power to recal the former entail, for Sir William the younger was diveſted of the fee, and only remained life-renter, and as ſuch could have no heir or ſucceſſor, and conſequently could not alter the ſucceſſion; neither could Sir William the elder do it, becauſe he had not an abſolute but only a conditional right by the proviſoes of the entail; which among others were, that the deſcendants of Sir Gideon Scott (the reſpondent's great grandfather) ſhould be excluded from the ſucceſſion in all events; and that he ſhould not alter the courſe of ſucceſſion in prejudice of the heirs of entail, and if he ſhould do in the contrary that ſuch deed ſhould be void; and they inſiſted, that the ſaid decree whereby the entail, under which the appellant claims, was declared to have been falſe and forged, was null, the action implying a contradiction. For the purſuers in that action, in their deed of revocation, and in their libel, ſet forth that the entail was made by them and recorded as the law directs, and yet in the ſame libel they conclude that the ſame deed ſhould be decreed to have been falſe and forged.

In this action the reſpondent appeared and made defences: and the cauſe being heard before the Lord Ordinary, his lordſhip, on the 18th of June 1712, "Repelled the allegation made for "the appellant againſt the decree of certification, and found the "ſaid decree ſufficient to exclude his title in that action;" and to this interlocutor his lordſhip adhered upon the 17th of February 1713. The appellant reclaimed to the whole Court, and their lordſhips, upon the 23d of June 1713, "Found that there being "no antecedent onerous cauſe made or done to Sir William Scott "the younger, of Harden, for making the former entail of his "eſtate, eſpecially in favour of heirs to be begotten and born, "and ſeeing the ſaid entail did remain in the terms of a perſonal "right without being perfected by charter and ſaſine, it was re-"vocable by Sir William the maker thereof, with conſent of Sir "William his father, the firſt inſtitute, and is actually revoked "by them conform to the revocation in proceſs; and therefore "found no need to adviſe the relevancy of the reaſons of reduc-"tion proponed againſt the ſaid decree, but aſſoilzied from the "reduction of the ſecond entail and the ſaid decree of certification "ſimpliciter."

The appeal was brought from "ſeveral interlocutory ſentences "and decrees of the Lords of Seſſion of the 18th of June 1712, "the 17th of February and 23d of June 1713." Entered, 1 Dec. 1713.

Heads of the Appellant's Argument.

Sir William Scott the younger having diveſted himſelf of his eſtate without reſerving any power to alter, and the entail being

delivered to Sir William the father, as inſtitute in the entail, and he having got the ſame recorded by authority of the Lords of Seſſion, and ſerved Sir William the younger with inhibition to prevent his making any deed in prejudice to the firſt entail, he could not thereafter recall or void the ſame at his pleaſure.

The maker of a gratuitous or voluntary deed, whereby the grantor is diveſted of the fee has no power by the law of Scotland to alter it at pleaſure, though no charter or infeftment followed thereupon. 1ſt, Any perſon may diveſt or oblige himſelf as firmly by a gratuitous deed, as by a deed for valuable conſiderations. 2dly, In this caſe the entail recites to have been executed for certain good weighty conſiderations and onerous cauſes, ſo that it was not gratuitous; for by the law of Scotland, an inſtrument or deed ſolemnly executed, containing any confeſſion or declaration concerning matters of fact, proves fully againſt the ſubſcriber of ſuch inſtrument, which muſt the rather hold in this caſe; eſpecially ſeeing, 3dly, The deed was made in favour of the father, from whom originally the eſtate flowed, and the other heirs of entail in their order, becauſe their eſtates were entailed to the ſame line of ſucceſſion that the eſtate of Harden was: So that the firſt entail is to be conſidered as a real and onerous ſettlement made betwixt the father and ſon, whereby they mutually agree to diveſt themſelves of the power of altering, for preſerving the eſtate in the line choſen by them. But, 4thly, By the courſe of deciſions in Scotland mutual entails have always been admitted as onerous cauſes for each other: as, for inſtance, if Sir William Scott the elder and younger on the one part had ſettled the eſtate of Harden in default of iſſue male of both their bodies to the appellant's grandfather, and at the ſame time he had ſettled his eſtate of Raeburn in default of iſſue male of his own body upon the ſaid Sir William Scott, and their iſſue male, theſe mutual entails would have been valuable conſiderations for each other, and could not have been altered by either party, and this was in effect the caſe. For the appellant's grandfather, in 1681, five years before Sir William Scott's entail was made, ſettled his eſtate upon his own heirs male, whereby Sir William Scott and his heirs male would have ſucceeded in the courſe of ſucceſſion before the grantor's heirs of line; and Sir William Scott elder and younger are ſubſcribing witneſſes to this deed of ſettlement: and that this was a conſideration in making the firſt entail, does plainly appear from theſe words, which are part of the deed of entail, viz. "Becauſe he" (the ſaid Sir William Scott, jun.) "knew their eſtates "were entailed upon their heirs male, and that they would not "alter theſe entails and courſe of ſucceſſion therein ſet down," as in reality they have not done. But whether the firſt entail was gratuitous or not, it is equal in this caſe; for it is not denied that the ſecond entail under which the reſpondent claims was gratuitous, and by the act of parliament 1621, c. 18. may be reduced at the inſtance of the heirs of the firſt entail, who, with reſpect to the heirs of the ſecond entail, are lawful creditors. Though

1621, c. 18.

no reſignation or charter and infeftment followed upon the firſt entail, yet Sir William Scott having reſerved no power to alter the entail, as is uſual in all caſes, when ſuch reſerved power is intended, was bound the moment he executed the deed of entail; and the making reſignation, and taking out charter and infeftment thereon, concerned only the heirs of entail, but not the maker thereof, he having given a power to any perſon they ſhould appoint, to ſurrender the eſtate, when the heirs of entail pleaſed; and though the ſaid Sir William the younger had objected againſt ſuch ſurrender, yet he could not have ſtopped it, and therefore the obligation muſt remain binding upon him and his heirs, who had no intereſt in the fee ſimple of the eſtate, except the foreſaid reſervations in favour of a ſecond lady and children, which exclude all other reſervations. For *exceptio firmat regulam in caſibus non exceptis.*

By the following words of the act of parliament 1685, c. 22. viz. "The original tailzie once produced before the Lords of "Seſſion judicially, who are hereby ordained to interpoſe their "authority thereto, and that a record be made in a particular re- "giſter-book, to be kept for that effect, wherein ſhall be recorded "the names of the maker of the tailzie, &c. and being ſo inſert, "his majeſty, with advice and conſent foreſaid, declares the "ſame to be real and effectual, not only againſt the contraveners "and their heirs, but alſo againſt their creditors, compryſers, "adjudgers, and other ſingular ſucceſſors whatſoever, whether "by legal or conventional titles;" it is plain the entail is a real and effectual right after the ſame is exhibited before the Lords of Seſſion and recorded as above. 1685, c. 22.

It is plain Sir William Scott the elder had the entail in his poſſeſſion, as appears from his letter to Mr. Menzies for recording the ſame, and Mr. Menzies's receipt for 3*l.* 8*s.* ſterling as the fees thereof; and the Scots law preſumes it was a delivered deed when it appeared out of the hands of the grantor; neither did Sir William the younger make any objection againſt the recording of the ſaid entail for ſeven years thereafter, nor did he ever ſay that his father had indirectly got up the ſaid deed of entail; and there is no doubt, if he had not delivered it to his father, he would have demanded his oath upon the way and manner how he got the ſame.

The appellant ſupports his caſe by the deciſion of the Court of Seſſion, affirmed by the Houſe of Lords, in the caſe of Sir John Shaw *v.* Dame Margaret Houſton and Sir John Houſton her huſband, 10 March 1717-18: the words of the decree of the Court of Seſſion are, that the irritances and clauſes not to alter were binding upon Sir John Shaw, who made the entail then in queſtion, even ſuppoſing Sir John Houſton's lady to have been a gratuitous ſubſtitute or heir of entail. That caſe of Shaw and Houſton was very much ſtronger than the preſent, for Sir John Shaw kept the entail in his own hands, and never perfected the ſame by charter and ſaſine. 2dly, That entail was made in favour of himſelf, as the firſt inſtitute with a power to alter; and the obligations or irri- No. 46 of this Collection.

tancies were only to commence upon the heirs of entail agreeable to the ſtatute 1685. 3dly, Albeit Sir John Shaw's entail was made in a marriage-ſettlement, yet that did not alter the caſe; that ſettlement was no further onerous than in ſo far as concerned the wife and children of that marriage; the entail, in ſo far as it extended further, was a choice gratuitous and free; and yet the Court of Seſſion in the one caſe decreed, that the two Sir William Scotts joining together could alter that entail, and in the other caſe, that Sir John Shaw was bound by the clauſes irritant not to alter.

Heads of the Reſpondent's Argument.

The deed in queſtion was not delivered, but on the contrary was intended not to be delivered, there being a clauſe in the deed diſpenſing with the not delivery in caſe of his death. It is true it was recorded, but that was done without either the order or privity of the grantor: for theſe are the words in the deed of revocation. "It was" (meaning this deed) "in my abſence and "without my order put into the public regiſter, I being at that "time abroad out of the kingdom." This therefore can never be looked upon as a deed delivered by Sir William.

Though it contain no power of revocation, that is of no conſequence, it being unneceſſary, becauſe by the law of Scotland, it is alterable of its own nature, being conſidered only as an intention or deſtination of ſucceſſion to take place after his death, in caſe he ſhould not make any alteration therein. This is the undoubted law of Scotland, and ſo it is laid down by the greateſt lawyers of that country when writing on this ſubject: and the judges as often as any queſtion of that kind has come before them, have ſo determined it, particularly in the caſe of Lord Lindores, where they found that a voluntary ſettlement, though under the ſtricteſt proviſions not to alter, was ſtill alterable at pleaſure by the firſt maker. So that clauſes of revocation are not of any uſe in deeds of this kind.

Lord Lindores's caſe. Dalrymple, 8 Dec. 1714. Bruce, 18 Feb. 1715.

Though Sir William the maker, obliged himſelf to reſign the eſtate, and make himſelf only liferenter; yet that reſignation or ſettlement never was made, and the deed continued only in the nature of a declaration of what was then intended; which, as has been ſaid, continued alterable at pleaſure.

As to the caſe of Shaw and Houſton; 1ſt, Sir John Shaw, who made the ſettlement, was expreſsly tied up from making any alteration; but in the caſe in queſtion, there is no ſuch reſtriction upon Sir William the ſon; theſe reſtrictions are only put upon Sir William the father, and the heirs ſubſtituted to him. Beſides, though the deed of 1685 be called an obligation, yet the ſaid Sir William the ſon was not bound to any other perſon; ſo that if it be to be called an agreement, it is only with himſelf, which ſhews it to be only in the nature of a will. 2d, In the caſe of Shaw and Houſton the ſettlement was by marriage-contract, and was a ſolemn agreement between different parties, publickly, and with the greateſt ſolemnity executed and duly regiſtered with conſent of

of all parties, and was made upon an onerous cauſe or valuable conſideration. For Sir John Shaw the father, who was a party to that agreement, had quitted his liferent of the lands thereby ſettled, and had made ſeveral other proviſions in view and conſideration of that very ſettlement; but in the ſettlement in queſtion there was no valuable conſideration, no contract with different parties, but a *deed poll** containing a deſtination of ſucceſſion not intended to be delivered, and made purely to guard the eſtate againſt the dreaded forfeiture. 3d, In the caſe of Shaw there was a power to the father and ſon to alter the ſame together, which ſhewed that the father had an intereſt in the covenant, but here was no other party, nor any other intereſt than that of the maker of the tailzie.

By the law of Scotland, no man can diſpoſe of any eſtate of inheritance by will, but muſt do it by deed; ſhould then the appellant's doctrine take place, that a man who once by deed obliges himſelf to make any voluntary ſettlement of his eſtate muſt purſue that and cannot alter it, the conſequence would be, that no man could make any voluntary ſettlement but once in his life; which is attended with conſequences too obvious ever to be received.

The deed whereby the appellant inſiſts, that the reſpondent was excluded, was only made upon a certain view, on conſideration of the circumſtances of the family, as they then ſtood, which afterwards were altered; and that deed was not a contract or ſettlement, but only an intention to make one, which was never made, and the grantor was conſequently at liberty to alter it in favour of the reſpondent his heir at law.

After hearing counſel, *It is ordered and adjudged, that the ſaid petition and appeal be diſmiſſed, and that the ſaid ſeveral interlocutors therein complained of be affirmed.* Judgment, March 9. 1718-19.

For Appellant, *David Dalrymple. Thomas Lutwyche.*
For Reſpondent, *Rob. Raymond. Jo. Pringle. Wil. Hamilton.*

Vide the caſe Muirhead *v.* Muirhead, No. 2. of this collection; where a diſpoſition was found to be revocable even where infeftment had been taken thereon.

* I retain this technical Engliſh expreſſion, merely to mention what perhaps is not generally known in Scotland, that in England there are two ſorts of deeds, deeds *poll*, and deeds *indented*: a deed *poll* is a deed conſiſting of one part only; a deed *indented* conſiſts of more parts than one, and the parties to it interchangeably execute the ſeveral parts or copies. The latter is called an *indenture* becauſe the top of it is indented or cut in an undulating ſhape; whereas a deed *poll* is cut ſtraight or *polled*.

Caſe 52. John Arratt late Profeſſor of Philoſophy at St. Andrews; - - *Appellant*;
John Wilſon, - - - *Reſpondent.*

23d *March* 1718-19.

Truſt.—Circumſtances inferring the truſt of a diſpoſition, bearing to be heritable and irredeemable, and upon which infeftment had followed.

The truſt being declared, the truſtee is ordered to continue in poſſeſſion, until it be redeemed, or proved that he was paid

After ſeveral interlocutors, holding the appellant as confeſſed for not deponing, the appeal is brought that he might be reponed to his oath, but the interlocutors are affirmed.

Vis et metus—During the dependance of this proceſs, the truſtee having arreſted the grantor of the diſpoſition upon one of the debts paid by and aſſigned to ſuch truſtee, and while under caption having taken from the grantor a diſcharge and renunciation of all truſt, and a diſclaimer of his action of reduction: this diſcharge reduced upon the head of *vis et metus*; and the truſtee is ordered to pay 60*l.* Scots of expences, before he ſhould be heard in the principal cauſe.

Caſts.—40*l.* coſts given againſt the appellant.

THE reſpondent brought an action of reduction and declarator againſt the appellant, before the Court of Seſſion, for reducing a diſpoſition granted by him to the appellant of the eſtate of Baikie and other lands, and for declaring that the ſame was granted upon truſt only. The circumſtances which gave riſe to that action are ſtated by the reſpondent, as follows:

That Thomas Wilſon the reſpondent's father being in his lifetime ſeiſed of, or having right to the eſtate of Baikie and other lands to the value of above 100*l.* ſterling per annum, on which there were ſeveral adjudications, and other pretended incumbrances, the greateſt part whereof were founded upon null and extinguiſhed debts, agreed to ſettle the eſtate upon the reſpondent, on his giving ſecurity by bond, to pay his father and mother 200 merks Scots per annum during their lives, and the reſpondent and the appellant (who out of pretended friendſhip to the reſpondent did voluntarily offer to become bound with him as ſurety therein, and to whom the reſpondent gave a counter bond to indemnify) having granted a bond for payment of the ſaid annuity, the reſpondent's father accordingly on the 29th of March 1709 executed a diſpoſition of the ſaid eſtate in favour of the reſpondent and his heirs:

That the appellant, whilſt this agreement was tranſacting, having told the reſpondent, that he the reſpondent would never be able to carry on ſuch ſuits, as would be neceſſary for reducing the ſaid incumbrances, particularly againſt James Blair of Ardblair, to whom the greateſt part thereof had been aſſigned, and againſt whom the appellant ſaid that he had a perſonal execution, and could thereby force him to reaſonable terms; and therefore propoſed that if the reſpondent would colourably tranſfer his right of the ſaid eſtate to him, he would not only carry on ſuch ſuits in his

own

own name, and diſburſe what money ſhould be neceſſary for that purpoſe, but would alſo pay off any preſſing debts, which the reſpondent owed, and take diſcharges for the ſame, and lend him money for carrying on his trade; and it was expreſsly agreed that the appellant ſhould not make any agreement with the ſaid James Blair, or any other of the ſaid pretended creditors, without the reſpondent's conſent, and that upon payment of what money he ſhould ſo really diſburſe for or lend to the reſpondent, with intereſt for the ſame, and being indemniſied from the ſaid annuity he ſhould re-convey to the reſpondent; and the appellant declared he would take nothing for his own trouble, although the reſpondent offered him 1000 merks Scots on that account: that the reſpondent was by theſe means induced to accept of what had been ſo propoſed by the appellant, and did accordingly ſign a diſpoſition of his eſtate to the appellant, bearing date the 30th of March 1709, the day next after the date of the reſpondent's father's ſaid conveyance to him; but deſigned not to deliver the ſame, until what had been ſo agreed upon between the appellant and him ſhould be put in writing. That the reſpondent's father being entitled to ſeveral debts and ſums of money from the ſaid James Blair, did at the ſame time for enabling the appellant to make the better terms with him for the reſpondent's benefit, aſſign the ſame to the appellant, who thereupon by a bond or writing of the ſame date, obliged himſelf to be accountable to the reſpondent's father, his heirs and aſſignees, for what ſhould remain thereof after payment of the ſaid Blair's juſt demands, and his the appellant's own charges: and, that the appellant afterwards got into his hands both the reſpondent's and his father's ſaid diſpoſitions of the eſtate, on pretence of ſhewing them to his lawyer, and on a promiſe to return them, which he never did perform; and that he might be maſter of the whole writings, he cauſed his agent one Thomſon to borrow up the ſame, whoſe receipt the reſpondent produced in proceſs:

That the appellant did, indeed, at different times lend the reſpondent ſeveral ſums of money, amounting in the whole to about 30*l.*, for payment whereof the appellant gave him ſeveral promiſſory notes; and the appellant paid ſome ſmall debts for the reſpondent, but, inſtead of diſcharges, he took aſſignments thereof to himſelf, and did alſo commence ſuits againſt the ſeveral pretended creditors, but ſoon agreed the matter with them, and particularly with the ſaid James Blair, without the reſpondent's privity or conſent: that theſe tranſactions having given the reſpondent juſt cauſe of ſuſpicion, he preſſed the appellant, that the ſaid agreement between the reſpondent and him relative to the ſaid truſt ſhould be put in writing; but this being ſhifted off for a long time, and at length refuſed, the appellant was obliged to raiſe the ſaid action of reduction and declarator.

Soon after the commencement of this action, the appellant cauſed the reſpondent to be arreſted for one of the ſaid debts which had been aſſigned to the appellant; and the reſpondent while

while under caption ſigned a diſcharge of all things relating to the ſaid truſt, and a diſclaimer of the ſaid action.

The reſpondent having afterwards nevertheleſs proceeded in the ſaid action, and referred the proof of the truſt to the appellant's oath, he for that purpoſe exhibited ſeveral interrogatories for the appellant's being examined thereon, before the Lord Ordinary in the cauſe, one of which related ſolely to the manner of procuring the ſaid diſcharge. The Lord Ordinary on the 9th of December 1714 "of conſent of the appellant's procurators, without an act before anſwer, ordained the appellant to depone "before him on the ſeveral interrogatories, and aſſigned the 15th "of the ſame month for that effect."

The appellant did not give his depoſition; but at next calling of the cauſe the appellant's procurators produced the ſaid diſcharge, and inſiſted, that the whole proceſs and effect thereof was diſcharged, and that therefore there was no occaſion for the appellant's deponing. To this it was anſwered for the reſpondent, that the diſcharge was extorted, and that one of the interrogatories was with reſpect to the way and manner of obtaining thereof; and that, therefore, it ought not to be made uſe of againſt the appellant's being holden as confeſſed. The Lord Ordinary on the 17th of December 1714 "Held the appellant as confeſſed upon the ſeveral facts or allegations contained in a condeſcendance given in by the reſpondent; and in the mean time allowed the reſpondent to ſee the diſcharge produced by the appellant, and both parties to be ready to plead the import "th ereof at next hearing."

The reſpondent afterwards brought an action for reduction of he ſaid diſcharge, and ſet forth the means by which he contended the ſame had been extorted from him. This was oppoſed by the appellant's procurators, who denied the reaſons alleged for reduction thereof, and inſiſted that though they were true, they were not relevant; for what had been done therein was to compel payment of a juſt debt, and nothing could hinder the appellant from accepting a diſcharge that was juſt and reaſonable in itſelf. The Lord Ordinary on the 21ſt of January 1715 "Found the rea-"ſon of reduction relevant to be proved by the reſpondent, and "allowed him a time for proving the ſame." The reſpondent having accordingly cited his witneſſes, the appellant afterwards preſented a petition for a conjunct probation, which being anſwered by the reſpondent, whoſe witneſſes were then waiting to be examined, the Court on the 25th of February 1715 "Ordered "the reſpondent's witneſſes to be examined that afternoon, and "granted to the appellant for examining his witneſſes to the 5th "of June following." The reſpondent's witneſſes were accordingly examined, but the appellant examined no witneſs.

The Lord Ordinary having reported the proof which had been taken, the Court on the 30th of June 1716 "Found the reaſons "of *vis et metus* proved, and therefore reduced the ſaid diſ-"charge, and decerned the appellant to pay to the reſpondent the "ſum

" ſum of 60*l.* Scots of expences, before he ſhould be heard fur-
" ther in the cauſe, and remitted both parties to be heard in the
" principal cauſe, after payment of the ſaid 60*l.* Scots before the
" Ordinary."

The appellant then inſiſted that he might ſtill be allowed to depone, ſince he had been deprived of the opportunity of doing it only by the ſhortneſs of the time allowed him for that purpoſe, and that there was no act extracted upon the interlocutor holding him as confeſſed.

The reſpondent ſtated that the appellant's not deponing and inſiſting upon a diſcharge which he had extorted during the dependance of the action, was a plain indication of the truſt. The Lord Ordinary having reported the debate, the Court on the 25th July 1716 " Before anſwer as to that point how far the appellant was
" to be reponed againſt his being held as confeſſed, ordained him
" to give in before the Ordinary a condeſcendance of the *res geſta*,
" and for what onerous cauſe the diſpoſition was granted." The appellant not having given in ſuch condeſcendance, the Lord Ordinary on the 27th of the ſame month " Adhered to the ſaid in-
" terlocutor holding the appellant as confeſſed, and ordained him
" to denude himſelf of the lands in the ſaid diſpoſition, in favour
" of the reſpondent bearing all clauſes neceſſary."

The appellant pleaded, that it being ſeven years ſince the diſpoſition was made to him, it was impoſſible for him in two days to make up ſuch ſpecial condeſcendance, or give an account how ſuch onerous cauſe had been performed: but, after ſundry proceedings, he gave in a condeſcendance of ſums alleged by him to have been paid to the reſpondent and his father's creditors, amounting to 2784*l.* ſterling, which, he contended, far exceeded the value of the lands; and he petitioned the Court ſtill to allow him to depone, whether the diſpoſition was in truſt or not.

After anſwers for the reſpondent the Court on the 8th of January 1717 " Ordered the appellant to produce upon oath his
" whole writings with the grounds and vouchers thereof." And on the 1ſt of February thereafter, the Court " Found, that the
" holding the appellant as confeſſed upon the truſt ſhould not
" prejudge him of any debt, right, or diligence he had upon the
" eſtate, in as far as might be extended to the ſums truly paid
" by him on account thereof, and remitted to the Lord Ordinary
" to proceed accordingly."

The cauſe coming to be heard before the Lord Ordinary, his lordſhip on the 13th of February 1717 " Ordained the appellant
" to produce the minute of agreement between the ſaid James
" Blair and him, about the tranſaction, both as to the liferent
" eſcheat, and his pretenſions on the eſtate of Baikie, for clear-
" ing what he paid for the ſame." And this interlocutor was adhered to by the whole Court on the 11th of June 1717.

The Court on the 9th of July 1717 " Found that the diſpoſi-
" tion made by the reſpondent and his father was redeemable by
" the reſpondent for the ſums truly paid or undertaken by the
" appellant, and his neceſſary charges, and the intereſt of the
" ſaid

" ſaid ſums and charges from the reſpective times of payment " thereof, deducting the appellant's receipts of the rents of the " lands, and other effects of the reſpondent and his father, from " the reſpective times they were received; and ordered the ap- " pellant to continue in the poſſeſſion, until it be redeemed, or " proved that he was paid, and remitted to the Lord Ordinary to " proceed accordingly."

The cauſe being heard before the Lord Ordinary, his lordſhip on the 23d of July 1717 ordered the appellant to give in an account, charge, and diſcharge, of his intromiſſions in terms of the act of ſederunt, by Thurſday then next; but the time was afterwards enlarged to the 5th of November following. At a calling of the cauſe on the 13th of November 1717, the Lord Ordinary, on the appellant's craving further time for giving in his ſaid account of charge and diſcharge, " Ordered him to give in " the ſame by Tueſday then next, with certification if he failed, " he ſhould be found liable to the penalty in the ſaid act of " ſederunt."

The cauſe being afterwards heard before the Lord Ordinary, he on the 21ſt of November 1717 " In regard the appellant had " failed to give in his account of charge and diſcharge in terms of " the former interlocutor, and that the reſpondent had given in " an account of charge and diſcharge ſigned by him in terms of " the ſaid act of ſederunt, held the appellant as confeſſed upon " the ſaid account given in by the reſpondent, and found that by " the ſaid account the appellant was ſatisfied and paid off all his " rights on the ſaid eſtate, and therefore decreed the appellant to " denude himſelf of the ſaid eſtate in favour of the reſpondent, " and declared in terms of the reſpondent's libel, and alſo de- " cerned the appellant to pay to the reſpondent 81*l.* 11*s.* 4*d.* " Scots, being the balance of the ſaid account."

Entered 16 Dec. 1727.

The appeal was brought from " An interlocutory ſentence " of the Lord Ordinary the 9th of December 1714, and " from another interlocutor of his lordſhip of the 17th of the " ſame month, and from an interlocutory ſentence of the Lords " of Seſſion of the 30th of June 1716, and from an interlocutor " of the ſaid Lords of the 25th of July following, and from an in- " terlocutor of the Lord Ordinary of the 27th of the ſame month, " and from the interlocutor of the Lords of Seſſion of the 8th of " January and 1ſt of February 1717, affirming their former in- " terlocutors, and from their interlocutor and decree of the 9th " of July 1717, and alſo from an interlocutor of the Lord Or- " dinary of the 21ſt of November following."

Heads of the Appellant's Argument.

The lands in queſtion were purchaſed by the reſpondent's father in 1667, from the Earl of Strathmore, the ſuperior, for the price of 956*l.* 13*s.* 4*d.* ſterling; and the Earl reſerved a feu duty of 12 bolls of victual and 1*l.* 13*s.* 4*d.* ſterling. The reſpondent's father was, according to the laws of Scotland, denounced for not payment of a debt, and having continued under rebellion for a year,

year, his life-rent eſcheat fell to the ſuperior. The ſuperior granted the ſame to John Lyon, Eſquire, who thereupon brought an action before the Court of Seſſion, and in 1687 obtained judgment, whereby it was decreed, that the rents and profits of the reſpondent's father's real eſtate, during his life, did of right belong to Mr. Lyon the donatory; and in purſuance thereof, the enants were ordered to pay their rents to him. The reſpondent's ather being thus turned out of poſſeſſion, and being conſiderably i debt, was obliged to retire to Edinburgh, 40 miles diſtant from is eſtate, and live privately there, having little or nothing to aintain himſelf and his family.

In theſe circumſtances the reſpondent's father frequently aplied to the appellant for relief, and preſſed him to accept a couyance of the inheritance of the ſaid lands, ſubject to the claims f the ſuperior's grantee, and likewiſe ſubject to his own debts, nd to 200 merks Scots yearly to him and his wife during their ves. The appellant in pity to the circumſtances of the reſpoent's father, did at laſt agree to his requeſt, and accordingly the ranſaction took place by the diſpoſitions firſt of the father to the eſpondent, and next day of the reſpondent to the appellant, which as followed with ſaſine. The appellant did accordingly pay the ebts chargeable upon the ſaid eſtate, and the annuity to the repondent's father and mother during their lives.

By the act of the Scots parliament 1696, c. 25. no deed of truſt an be proved but by writ or oath of party; and as, in this caſe, he reſpondent does not pretend to have a counter bond, or ſo much as a miſſive letter from the appellant, declaring the truſt, ſo neither, as the appellant apprehends, ought he to have been excluded from the benefit of the ſaid act of parliament by giving his oath, whether ſuch deed was given to him in truſt, or for an onerous cauſe, and eſpecially ſeeing there was no decree extracted upon theſe interlocutors, nor could the appellant, as the circumſtances of the caſe are, poſſibly appear to be examined upon oath, in ſo ſhort a time as was at firſt limited; and he is willing ſtill to make oath, that the ſaid conveyance was abſolute and not in truſt.

Heads of the Reſpondent's Argument.

The appellant not having thought fit to anſwer upon oath to the interrogatories relating to the ſaid truſt, but ſuffered himſelf to be held as confeſſed thereon, and to rely wholly on the ſaid diſcharge, which he had extorted from the reſpondent, would now fain be admitted to ſwear him out of his eſtate, on pretence that he was ſome diſtance from Edinburgh, and could not come thither to depone by the time preſcribed. But this is entirely falſe, and never was ſuggeſted for more than two years and a half after his being ſo held as confeſſed. And though there has not been any proof made or offered on that account, *he, upon the head only of his being excluded the benefit of the ſaid act of parliament, by his not being admitted to depone upon the ſaid interrogatories after his being held as confeſſed thereon*, has brought his appeal for reverſal of all the

the ſaid interlocutory ſentences: But the reſpondent hopes, that the ſame ſhall be ſuſtained for the following reaſons, which would have been ſufficient to have proved the truſt before the ſaid act of parliament, viz.

There was no valuable conſideration; for as to what money the appellant lent to the reſpondent, and now pretends to have been part of the conſideration, he always had the reſpondent's notes or bills for it; whereas if it had been a purchaſe he would have taken diſcharges for the ſame.

As to the bond for the reſpondent's father's annuity the reſpondent was bound as principal, and the appellant only as ſecurity therein, and he had the reſpondent's counter bond to indemnify him; and for his further ſecurity, an aſſignment of a decree againſt John and James Crighton, for about 80*l.* which manifeſtly implies a truſt and not a purchaſe.

If it had been a real purchaſe and not a truſt, there had been no occaſion for the eſtates being conveyed firſt by the reſpondent's father to the reſpondent, and then by him to the appellant, which only ſerved to make the reſpondent liable for his father's debts, whereas it might have been conveyed at once by the father to the appellant.

It is particularly to be obſerved, that the appellant has not at any time during the action pretended that he had given any obligation or covenant to indemnify the reſpondent or his father from theſe debts, the payment whereof the appellant would have to be the onerous or valuable conſideration of his pretended purchaſe; and the greater the burthen of debts was, the truſt was the plainer, or the fraud the greater, ſince the reſpondent's father in his lifetime was, and the reſpondent ſtill is, liable for theſe debts.

The reſpondent's father's aſſignment of the debts and claims which he had againſt the ſaid James Blair to the appellant, and his, the ſaid appellant's, giving a bond to be accountable to the reſpondent's father for the ſame, with the appellant's ſubmiſſion to an award for theſe claims, on behalf of the reſpondent and his ſaid father do plainly denote a truſt.

The method which the appellant took to get free of the action, by extorting the ſaid diſcharge, does infer a truſt; for elſe, if he had not been conſcious thereof, why ſhould he be at ſo much charge and pains to get that diſcharge, and found his defence thereon, when by giving his oath at firſt, he might eaſily have acquitted himſelf of this proceſs.

Judgment, 23 March 1718-19. After hearing counſel, *It is ordered and adjudged, that the ſaid petition and appeal be diſmiſſed, and that all the ſeveral interlocutory ſentences and decrees and affirmances thereof in the ſaid appeal complained of be affirmed; and it is further ordered, that the ſaid appellant do pay, or cauſe to be paid to the ſaid reſpondent, the ſum of* 40*l.* *for his coſts in reſpect of the ſaid appeal.*

For Appellant. *Sam. Mead.* *Will. Hamilton.*
For Reſpondent. *Robert Raymond.* *Bat. Turnbull.*

Simon Lord Lovat, - - - - - - *Appellant*;
Kenneth Mackenzie, Factor and Aſſignee of the Creditors of Alexander Mackenzie late of Fraſerdale, - - - - - - *Reſpondent*.

Caſe 53. Dalrymple, 17 Dec. 1718.

4th *April* 1719.

Liferent Eſcheat.—An act of parliament, at the time of the rebellion 1715, having ordained perſons ſummoned by the crown to appear before the Court of Juſticiary, and find caution for their good behaviour under the pain of life-rent eſcheat, &c.; and the life-rent eſcheat of a perſon neglecting to appear, being adjudged and granted to a donatory; though there was no previous declarator, the rents are ordered to be paid to the donatory; but the creditors who were real at the time of the falling of the eſcheat are ordered to be charged on the eſtate in due courſe of law.

Conſtruction of the acts of parliament 1 G. 1. c. 20. and 50. and 4 G. 1. c. 8. The act 1 G. 1. c. 50. having enacted that all perſons who ſhould be attainted of high treaſon, before the 24th of June 1718, ſhould forfeit all eſtates which they were in poſſeſſion of on the 24th of June 1715, or afterwards, to his majeſty; and declared that every grant of ſuch eſtate, or any part thereof made by his majeſty, ſhould be void: Under the prior act 1 G. 1. c. 20. a perſon's life-rent eſcheat being adjudged on the 13th of October 1715, is gifted away by the crown; he was afterwards attainted of high treaſon before the 24th of June 1718; but the gift of eſcheat is found to ſubſiſt, notwithſtanding the proviſoe of the laſt mentioned act.

The veſting act 4 G. 1. c. 8. having declared the judgments of any court, relative to any claim out of a forfeited eſtate made ſince 24th June 1715, to be void; but containing a proviſo in favour of the gift of eſcheat before-mentioned, the judgment given in this caſe was not voided by ſaid act.

BY an act of Parliament 1 Geo. 1. c. 20. intituled "An act for "encouraging all ſuperiors, vaſſals, landlords, and tenants in "Scotland, who do and ſhall continue in their duty and loyalty "to his majeſty King George" &c., it was, inter alia, enacted that from the 1ſt of September till the 23d of January 1715, the king's advocate or ſolicitor in Scotland, might upon a warrant from his majeſty apply to the Lords of Juſticiary for an order to ſummon ſuch perſons whoſe names ſhould be contained in the warrant, to appear at ſuch time and place as his majeſty ſhould appoint, to find ſufficient bail for their loyal behaviour; and in caſe of contempt or wilful diſobedience, every perſon ſo charged ſhould incur the pains of ſingle and life-rent eſcheat, to be brought in for his majeſty's uſe, and ſhould be fined in 500*l.* and be liable to a year's impriſonment. 1 G. 1. c. 20.

Alexander Mackenzie of Fraſerdale, the huſband of Emilia who took the title of Baroneſs of Lovat, was ſummoned to appear before the Court of Juſticiary; but having neglected to do ſo, judgment was given againſt him in terms of the ſaid act upon the 13th of October 1715. And he was alſo engaged in the rebellion that year.

By another act 1 Geo. 1. c. 50. intituled "An act for ap- 1 G. 1. c. 50.
"pointing commiſſioners to enquire of the eſtates of certain "traitors" &c., it is, inter alia, enacted, that all the eſtates real

and perſonal, whereof any perſons (who ſince the 24th of June 1715, had been attainted of high treaſon or ſhould be attainted before the 24th day of June 1718, for any treaſon committed before the 1ſt of June 1716,) ſhould be ſeiſed or poſſeſſed of, intereſted in, or entitled unto, on the 24th of June 1715, or at any time afterwards, ſhould ſtand and be forfeited to his Majeſty, his heirs, and ſucceſſors, and ſhould be deemed veſted and adjudged to be in the actual and real poſſeſſion of his majeſty, without any inquiſition for the uſe of the publick. This act contained a clauſe to the following purport; "and to the end the "public may have the benefit of all the *forfeited* or *forfeitable* "eſtates by this act veſted or intended to be veſted in his majeſty, "it is hereby enacted and declared by the authority aforeſaid, "that all and every grant, demiſe, leaſe, confirmation, reſtitu- "tion, aſſurance, and diſpoſition whatſoever, made or granted, "or to be made or granted by his majeſty, his heirs, or ſuc- "ceſſors, under the great ſeal of Great Britain, or under any "his majeſty's ſeals in England, or Scotland, or otherwiſe, of "the ſame eſtates or any of them, or any part thereof, ſhall be "and are hereby declared to be null and void to all intents and "purpoſes whatſoever."

After the paſſing of this act, and whilſt the ſaid Alexander Mackenzie was in priſon for being engaged in the rebellion, the appellant petitioned his majeſty for a grant of the ſaid 500*l.* penalty, and of the ſingle and life-rent eſcheat, incurred as aforeſaid. The appellant in his petition ſet forth, that the lands (which were the eſtate originally of the ſaid Emilia) were worth about 500*l.* per annum, but very much incumbered with debts, ſo that it could not then be known what the clear produce might amount to, and that ſuch a grant would operate thus: that if the ſaid Alexander Mackenzie ſhould elude juſtice, by not being convicted of treaſon, this grant would take place during his life; and that if he ſhould be attainted, it would reach his perſonal eſtate at the time of the judgment againſt him for not obeying the ſummons, and the rent of his lands during his life, as far as the ſame ſhould not be limited or reſtrained by any act of Parliament concerning forfeitures. On the 23d of Auguſt 1716, his then majeſty, in conſideration of the appellant's zeal and ſervices in ſuppreſſing the rebellion in the north of Scotland, did by his grant under the privy ſeal, give, grant, and diſpone to and in favour of the appellant what had ſo fallen by the ſaid ſentence againſt the ſaid Alexander Mackenzie.

The appellant having entered to the poſſeſſion of the eſtate of Lovat in conſequence of this grant, he laid arreſtments in the hands of the tenants for their rents; and arreſtments having been alſo uſed by the reſpondent, the tenants brought an action of multiple poinding before the Court of Seſſion, in which the appellant and reſpondent appeared for their ſeveral intereſts. Pending this action Alexander Mackenzie was attainted of high treaſon.

The reſpondent contended that no grant from the crown of the ſingle and life-rent eſcheat could be in prejudice of creditors, eſpecially

eſpecially ſince the very act which gave theſe eſcheats to the crown did in ſeveral places ſhew the anxious care of the legiſlature to prevent any juſt and lawful creditors from ſuffering by the rebellion. And he referred to part of the preamble of the act, in theſe words, " And whereas in ſuch conjuncture eſpecially, " it is moſt juſt to puniſh rebellious ſubjects, and at the ſame " time to reward ſuch as continue firm and loyal to his majeſty's " perſon and government." In proof of this intention of the legiſlature, he cited alſo the following clauſe in the act, " And " becauſe it is hard, that any creditor remaining in peaceable " and dutiful allegiance to his majeſty, his heirs, and ſucceſſors, " ſhould ſuffer by the rebellion of his debtor, be it therefore " enacted by the authority aforeſaid, that no conviction or at- " tainder on account of the high treaſon or treaſon above-men- " tioned, ſhall hurt or exclude the right or diligence of any ſuch " creditor remaining peaceable and dutiful for ſecurity or pay- " ment of any true, juſt, and lawful debt, contracted before the " commiſſion of any of the aforeſaid crimes." And he contended, that though the *eſcheat* was not expreſsly named in the act, yet in the conſtruction of law, the act was to be extended to ſuch perſons, who by it are brought under certain penalties by which loyal creditors would ſuffer prejudice, if the ſaving clauſe were not extended to them. And the rather in this caſe becauſe the eſtate was the eſtate of the wife of Alexander Mackenzie, and could not be forfeited but for his life, and ſhould the grant in favour of the appellant ſubſiſt, the creditors would be deprived of the only fund for their payment, which was the rents and profits of the eſtate during his life. He contended too, that Alexander Mackenzie having been convicted of high treaſon, his real eſtate became veſted in the crown for the uſe of the public from the 24th of June 1715, which was long before the penalty of the life-rent eſcheat was incurred, being the 13th of October following; and therefore that the life-rent eſcheat, which was ſubſequent, could not be a burden upon the eſtate antecedently forfeited for treaſon; and ſince the law in general veſted all eſtates, there was no reaſon to infer the exception of eſcheats. And he ſtated, that ſuppoſing the life-rent eſcheat had been incurred, yet it was abſorbed by the following forfeiture ariſing from the attainder, or though the life-rent ſubſiſted after the forfeiture, yet the ſame was to be underſtood to be given to the public.

The appellant was heard in anſwer to all the objections of the reſpondent, and the Court, on the 18th of December 1717, " found that the eſcheat being given poſterior to the act of par- " liament appointing commiſſioners, to enquire, &c. whereby the " forfeited eſtates are veſted in the crown for the uſe of the public, " the rents of the lands in queſtion are abſorbed and compre- " hended in the forfeiture of the ſaid Alexander Mackenzie; albeit " the forfeiture was poſterior to the gift of the eſcheat; and found " that the rents of the ſaid lands are thereby ſubject to the debts and " diligences of the creditors preferably to the appellant." And

by another interlocutor on the 21ſt of December 1717, the Court "preferred the creditors to the donator, and decerned accordingly."

Entered 1 Feb. 1717-18.

The appeal was brought from "two ſeveral interlocutory ſentences or decrees of the Lords of Seſſion in Scotland of the 18th and 21ſt of December 1717."

After this appeal had been lodged, the creditors of Alexander Mackenzie preſented a petition to the Houſe of Lords, ſtating an act of parliament which had been paſſed alſo ſince entering the appeal; the act 4 Geo. 1. c. 8. intituled, "an act for veſting the forfeited eſtates in Great Britain and Ireland in truſtees, to be ſold for the uſe of the public; and for giving relief to lawful creditors by determining the claims," &c. By this act the truſtees were empowered to hear, determine, and adjudge all and every claim and claims of the lawful creditors and other claimants upon the forfeited eſtates, and the determinations of the truſtees were to be final, if the party claimant did not within twenty days enter his appeal to the Court of Delegates. By a clauſe in the ſaid act it was enacted, "that all and every ſequeſtration, ſuſpenſion, arreſtment, and other act and decree, made and paſſed by any Court of Judicature ſince the 24th day of June 1715, or which ſhall hereafter be made and paſſed otherwiſe than according to the directions of this preſent act, whereby any right, title, charge, or intereſt, into, out of, or upon any of the forfeited eſtates hath been or ſhall be decided and determined in favour of any creditors or perſon claiming intereſt therein, or whereby any perſon or perſons have been or ſhall be entitled to poſſeſs any part of the ſaid eſtates, real or perſonal, or to levy, receive, or diſcharge, any part of the rents and profits of the ſame by any ſuch decrees or ſentences or without any lawful title, are hereby declared to be void null, and of no effect, as if the ſame had never been made or paſſed."

4 G. 1. c. 8.

This act contained a proviſo to the following effect, "that nothing herein contained ſhall be conſtrued to extend to, or in any way to invalidate or infringe a grant made by his majeſty and paſſed under the privy ſeal of Scotland, bearing date the 23d day of Auguſt 1716, whereby his majeſty grants to Simon Lord Lovat the ſingle and life-rent eſcheat and ſum of 500 penalty, incurred and forfeited to his majeſty by Alexander Mackenzie of Fraſerdale, on account of his diſobedience and not appearing before the Lords of Juſticiary, when ſummoned ſo to do, purſuant to the directions of an act paſſed in the laſt ſeſſion of the preſent parliament, intituled, 'an act for encouraging all ſuperiors,'" &c. The petitioners therefore prayed that the appeal ſhould be diſmiſſed.

The Houſe made an order, that the creditors ſhould be at liberty to be heard by their counſel on the matter of the ſaid petition at the ſame time the cauſe was heard.

Heads of the Argument of the Creditors on this preliminary Point.

The appeal being brought to reverſe thoſe ſentences which are ſince annulled and made void by the ſaid act 4 Geo. 1. c. 8. the creditors hope the ſaid appeal ſhall be diſcharged, eſpecially ſince the appellant in the mean time continues in poſſeſſion of the eſtate, and thereby deprives the creditors of their juſt debts and intereſt, which many of them want for their ſubſiſtence.

With regard to the proviſo contained in this act in favour of the appellant; this proviſo only relates to the grant, but not to any decree for or againſt that grant, which ſtands upon the foot of the law, as it was on the former act of parliament for the forfeitures. The appellant will, no doubt, be entitled to inſiſt upon the benefit of his grant before the truſtees, and will receive their determination, but this proviſo will not be any prejudice to the reſpondents, who are lawful creditors.

His majeſty's ſolicitor-general in Scotland being ſatisfied that the ſole power of hearing and determining all claims relative to the forfeited eſtates, as well life-rent eſcheats as others, was by the laſt-mentioned act veſted in the commiſſioners, exhibited a claim before the ſaid commiſſioners, for and on behalf of the crown, for the ſingle and life-rent eſcheats of all the perſons, who had by virtue of the ſaid act for encouraging ſuperiors, &c. forfeited the ſame. Theſe commiſſioners, on the 22d of September 1718, after hearing counſel on both ſides, pronounced the following decree, viz. "That the real eſtates of the perſons "attainted and convicted were veſted in his majeſty, and are "now veſted in them as truſtees for the uſe of the public, with "all rights and titles thereto, as they ſtood in the forfeiting per-"ſons on the 24th of June 1715, free from the life-rent eſcheats "claimed; and do therefore diſmiſs the claim as to the life-rent "eſcheats." The ſolicitor-general appealed from this decree to the Court of Delegates, and they, upon hearing counſel the 30th day of December 1718, did "order and adjudge that the ſaid "appeal, ſo far as relates to the ſaid life-rent eſcheats, be diſ-"miſſed; and that the decree of the ſaid truſtees, with relation "to the ſaid life-rent eſcheats be affirmed."

No caſe for the appellant upon this preliminary point appears.

On the Merits—Heads of the Appellant's Argument.

The debts of the pretended creditors, who oppoſe the appellants have been contracted with a deſign to burden the eſtate, and bear date for the greateſt part after the 24th of June 1715. Theſe creditors joined in naming the reſpondent, Kenneth Mackenzie, (who had all along been factor and agent to Alexander Mackenzie, the forfeiting perſon) as their factor, to whom they aſſigned their pretended debts.

No law ever burdened ſingle or life-rent eſcheat, with any other debt than that of the horning whereon it fell, and which was introduced by expreſs ſtatute; and therefore as the eſcheat in queſtion

did not fall on account of any debt, no reaſon could be aſſigned why this grant ſhould be burdened therewith; for though the lords of the treaſury, by the king's allowance, have ſometimes granted eſcheats with the burden of the rebel's debts, and for that purpoſe have taken bond from the grantees for payment thereof, yet this favour was never claimed of common right.

The reſpondents contended, that there having been no general or ſpecial declarator, before the appellant's grant paſſed, the ſame was not a good title for poſſeſſion againſt perſonal creditors endeavouring to affect the life-rent eſcheat by arreſtments. But on eſcheats being veſted in the crown, his majeſty's grant paſſing the exchequer and the ſeals is a ſufficient title for poſſeſſion, and a general or ſpecial declarator was not neceſſary either for completing his majeſty's right, or eſtabliſhing the appellant's title, eſpecially in this caſe, where the ſolemn manner, in which the eſcheat in queſtion was adjudged by ſentence of the Court of Juſticiary to be fallen, ſuperſeded the neceſſity of any ſuch declarator.

With regard to the ſaving clauſe in the act of parliament for encouraging all ſuperiors, &c. whereby it is provided, that the rights and diligences of juſt creditors ſhall not be hurt or excluded by the conviction or attainder of their debtors for high treaſon; that ſaving clauſe is limited and reſtrained to the caſe of forfeiture on conviction or attainder for high treaſon, and no way related to eſcheats, which are left untouched, to fall to the king, in the ſame extent, as they did belong to him before that act.

By the veſting clauſe in the act appointing commiſſioners to enquire, &c. the life-rent eſcheat in queſtion, at the time of the grant thereof to the appellant, was not veſted in his majeſty for the uſe of the public: for although that act veſts in his majeſty, for the uſe of the public, the eſtates of perſons attainted of treaſon, which they were ſeiſed of the 24th of June 1715, yet this life-rent eſcheat was veſted in his majeſty for his own uſe, before the attainder of the ſaid Alexander Mackenzie for the treaſon, by virtue of an act for encouraging ſuperiors and vaſſals; and by a clauſe in the ſaid act of enquiry, it is expreſsly provided, that that nothing in that act ſhould extend or be conſtrued to extend to repeal, alter, or make void any of the proviſions, matters, or things contained in the ſaid act for encouraging ſuperiors and vaſſals. And the veſting the life-rent eſcheats thereby fallen in the king for his majeſty's uſe, and at his diſpoſal, is one of the principal proviſions and matters in the ſaid laſt-mentioned act.

As the eſcheat and forfeiture for treaſon are the puniſhments for two different crimes, and the effects of two different cauſes, the firſt for the contumacy of Alexander Mackenzie, and the other for his treaſon; ſo if he had had a fee in this eſtate, which by his attainder for treaſon would have become veſted in his majeſty for the uſe of the public; yet there would have been two different eſtates in the king; the firſt a life-rent eſcheat veſted in his majeſty by the act for encouraging ſuperiors and vaſſals for his own uſe, and the inheritance veſted in him for the uſe of the public;

ublic; and therefore it would be a ſtrange conſtruction to have onſolidated both theſe eſtates, which would have been veſted in is majeſty for different purpoſes. And it cannot be denied, ut that if the ſaid Alexander Mackenzie had not been ſo attainted, he right to the ſaid eſcheat would ſtill have exiſted in the appel- ant; and it would be ſtrange to imagine, that the right ſo veſted n him ſhould by the attainder of the ſaid Alexander Mackenzie, o happening afterwards, revert to his majeſty, and be reveſted n him, and then conſolidated with the eſtate forfeited by the reaſon for the uſe of the public; but, however, in this caſe Alexander Mackenzie had no fee in him to forfeit.

But it did not properly lie before the Court of Seſſion, (as the ppellant conceives) to determine and make void the appellant's ſaid grant, as in effect they have done, at the inſtance of the re- ſpondents, whoſe pretended debts would not affect the ſaid eſtate in the hands of the truſtees; but their lordſhips ought only to have determined, whether or not the reſpondents ought to be paid their ſeveral debts out of the eſcheat lands in queſtion, that ſo the appellant (who never refuſed the payment of any real debt affecting the eſtate) might have diſputed the juſtice of any of the reſpondents' debts, and put them to make due proof thereof.

By a clauſe in the act 4 Geo. 1. c. 8. for veſting the forfeited eſtates in truſtees, &c. (made ſince pronouncing the interlocutors appealed from) it is provided, that nothing in the ſaid act con- tained ſhall be conſtrued to extend to, or in any way to invalidate or infringe his majeſty's ſaid grant to the appellant, whereby the ſaid life-rent eſcheat, notwithſtanding any ſuch pretended conſo- lidation is well ſaved to the appellant.

(Subjoined to the appellant's caſe, he gives a liſt of the debts claimed by the reſpondents, with their reſpective ſecurities and dates thereof.)

Heads of the Reſpondents' Argument.

Though Alexander Mackenzie was not attainted of high treaſon till ſome time after the date of the grant to the appellant, yet whenever that attainder took place, it was drawn back expreſsly by the act 1 G. 1. c. 50. to the 24th of June 1715, and as that was before the penalty of the eſcheat incurred, ſo this eſcheat is in the nature of every other charge, and could not affect the forfeited eſtate poſterior to the time when that forfeiture com- menced; and therefore ſince the eſtate of Mr. Mackenzie is de- clared by law to be forfeited from the 24th of June 1715, the ſucceeding penalty of the eſcheat could be no charge, and the ſame was veſted in his majeſty, independent of that charge, for the uſe of the public.

Though the grant to the appellant was prior to Mr. Macken- zie's attainder, yet it was poſterior to the act veſting the eſtates in his Majeſty for the uſe of the public; now ſhould any grant be made poſterior to that act, of any part of the eſtate ſo ſurren- dered, it were eluding the act. Had Mr. Mackenzie never been forfeited, the grant might have been good, but when he was

attainted of treaſon, and that attainder drawn back to the 24th of June 1715, before the eſcheat fell, it muſt void that grant; for his Majeſty having ſurrendered to the public the real eſtates of the rebels in the event of their reſpective attainders, whereby their eſtates were by law to become forfeited to his Majeſty prior to the ſurrender, and by which their eſcheats were to be abſorbed, it could not but be in view that they were to go to the public free of thoſe burdens. For the ſurrender muſt be underſtood to be *pro omni jure*, eſpecially as *beneficia principum* are to be interpreted in the moſt benign and ample manner.

It is ſtill more evident, that theſe eſcheats, after the ſurrender to the uſe of the public, did not continue in the king, otherwiſe it would have been unneceſſary for Lady Panmure, and others, to apply for acts of parliament to enable his majeſty to make proviſion for them during their huſbands lives, if their huſbands life-rent eſcheats (which were all incurred in the ſame manner as Mr. Mackenzie's) had remained in his majeſty.

The appellant founded upon a proviſo in the act 1 G. 1. c. 50. for appointing commiſſioners, declaring that nothing in that act ſhould extend to take away, repeal, alter or make void, any of the proviſions, matters, or things, contained in the act for encouraging ſuperiors. But this proviſo is only in favour of the rights of ſuperiors, vaſſals, tenants, creditors, &c. continuing dutiful and loyal to his majeſty, but does not reſerve any intereſt to the crown; and for this obvious reaſon, becauſe nothing was or could be ſuppoſed to be in the crown, but what was made over to the public by the firſt veſting clauſe, which was to have its full effect from the 24th of June 1715.

1689. c. 33. By an act of parliament in Scotland 1689. c. 33. it is enacted, that no vaſſal or creditor, perſonal or real, ſhall be prejudged or loſe any of their lands or eſtates, or any of their true and juſt ſums remaining due to them, by their debitors' or ſuperiors' forefaulture. And the crown never uſed to make any grant of theſe life-rent eſcheats to the prejudice of creditors; but on the contrary, the donators of ſuch eſcheats have always been obliged to grant back bonds to be accountable to the creditors. Both from the recital and enacting part of the act for encouraging ſuperiors, &c. it is plainly the intention of the parliament, that no forfeiture or conviction on account of treaſon ſhould prejudice creditors: It never can be imagined, that a forfeiture ariſing from a ſmaller crime was to be extended to the prejudice of the creditors; that, in moſt caſes, would have been a forfeiture of the king's loyal ſubjects, eſpecially the reſpondents, who have no other fund of payment but theſe very rents.

The appellant himſelf did underſtand, that the eſcheat was to be charged with the debts, for in his memorial to his majeſty, he ſets forth the value of the eſtate to be 500*l.* per annum, *but much incumbered with debts*; it were then unreaſonable for the appellant now to pretend to exclude theſe creditors.

Judgment, 4 April, 1719. After hearing counſel *upon the petition and appeal of Simon Lord Lovat, as alſo upon the anſwer of Kenneth Mackenzie, and likewiſe upon*

upon the petition of the ſaid Kenneth Mackenzie. It is ordered and adjudged, that the ſaid interlocutors, ſentences, or decrees complained of in the ſaid appeal be reverſed, and that the rents of the eſtate in queſtion be paid to the appellant according to his grant; but that ſuch debts of the creditors of the ſaid Alexander Mackenzie as were real, and did by the law of Scotland affect the eſtate in queſtion, at the time of the forfeiture of the life-rent eſcheat, be charged on the ſaid eſtate in due courſe, according to the ſaid law.

For Appellant, *David Dalrymple. Rob. Raymond.*
For Reſpondent, (in both caſes) *Edw. Northey. Will. Hamilton.*

William Moriſon, of Preſton Grange, Eſq; *Appellant;*
James Smith of Whitehill, and David Burton Glazier in Edinburgh - - *Reſpondents.* Caſe 54.

8th *April* 1719.

Society.—The minutes of a meeting of a company, ſubſcribed by the preſes, bore that certain members ſold to another their ſhares of the joint ſtock at a given price; the perſon to whom the ſhares were ſo aſſigned afterwards entered to the management of the whole concern, and applied the profits to his uſe; it is found that he was obliged to pay to each partner the ſums mentioned in ſaid minute, though it was objected, that the minute was eraſed in ſome ſentences, and that there was *locus pœnitentiæ* till a more formal aſſignment was made.

The aſſignee is alſo ordered to free the aſſignors from the debts of the ſociety, and pay them intereſt on the ſums found due.

Compenſation.—In a ſuſpenſion, the ſuſpender's plea of compenſation is rejected.

Coſts.—20*l.* coſts given againſt the appellant.

BY articles of agreement, executed in March 1698, between the appellant, Sir William Binning, Patrick Steel, the reſpondents, and others, it was agreed to ſet up and carry on a glaſs-work in Moriſon's Haven, at their mutual expence, and to their mutual profit, and to conſiſt of ſhares of 50*l.* ſterling each ſhare; and it was agreed, that if any of the copartners ſhould be inclined to ſell or aſſign his ſhare, it ſhould not be lawful for him ſo to do, until he ſhould make the firſt offer thereof to ſome of the copartners, and if they ſhould refuſe, he might then ſell, ſo as it were not at a lower value than what was offered by the ſaid copartners: They were likewiſe by the ſaid articles to appoint ſome of their own number to be overſeers of the work; and they named George Livingſton, one of the copartners, to be their caſhier or treaſurer.

By other articles of agreement in April thereafter, between the appellant and the other copartners, and Daniel Titterie, glaſs-maker in Newcaſtle, the ſaid copartners leaſed to Titterie the ſaid glaſs-manufactory and premiſes for 9 years, commencing at Whitſunday 1698. At a meeting of the copartners in September 1699, Sir Wm. Binning and Patrick Steel, two of them, ſurrendered their ſhares to the appellant, he paying to each of them

10*l.*

10*l.* ſterling yearly during the continuance of Titterie's leaſe, till they ſhould be repaid what they had advanced of their ſhares; and it was then (as the reſpondents ſtate) expreſsly agreed, that they who had purchaſed any ſhares ſhould be liable for payment of all incumbrances theſe ſhares ſhould be liable to.

The ſaid glaſs-work was carried on amicably by the company till the 21ſt of October 1699; when at a meeting of the co-partners a tranſaction took place, relative to a reſignation by the reſpondents and one other of the copartners, of their ſhares to the appellant. In 1700, the reſpondents and the other partners brought an action againſt the appellant, before the ſheriff of Edinburgh, ſtating, that among others the reſpondent Smith had paid in 100*l.* ſterling towards carrying on the ſaid manufactory, and the reſpondent Burton 76*l.*, for which ſums they had got receipts from the ſaid George Livingſton, caſhier to the copartners; that at the ſaid meeting on the 21ſt of October 1699, the reſpondents, and one other of the copartners, reſigned their ſhares to the appellant, he paying to each of them 10*l.* per annum, during the continuance of Titterie's leaſe, and after the expiration of the ſaid leaſe paying what ſhould then remain due upon the original ſhares, upon which terms the appellant accepted the ſame; and, that this, (as all the other tranſactions of the company were) was marked in the minutes of their ſederunts, and ſigned by the preſident of the meeting: that the appellant having thus purchaſed almoſt all the ſhares of the manufactory, he took the ſole management of the works upon himſelf, and on the laſt day of February 1700 granted a factory to one James Smith, to overſee, inſpect, manage, act, and do as principal clerk, overſeer, and accountant at Moriſon's haven, and upliſt all debts owing to the ſaid glaſs work, &c. and generally to do every thing concerning the premiſes as if the appellant were perſonally preſent. And their action concluded, that the appellant ſhould be decerned to make payment of the ſeveral ſums agreed upon. The ſheriff, on the 2d of October 1700, decerned againſt the appellant for payment to each of the purſuers of 10*l.* ſterling yearly, beginning the firſt year's payment upon the 21ſt of October 1700, and ſo on yearly thereafter until the term of Whitſunday 1707, when the contract with the ſaid Daniel Titterie expired, and at that term the appellant to make full payment to each of them, of what ſhould remain unpaid of their original ſhares advanced and paid in, among others, the reſpondent Smith's ſhare being 100*l.* and the reſpondent Burton's being 76*l.* with the intereſt of the ſaid ſums, and to relieve the reſpondents of all debts contracted and loſs ſuſtained upon account of the ſaid works, and further to pay 14*l.* Scots to each of the reſpondents for expences.

The reſpondents extracted the ſheriff's decree, and gave the appellant a charge of payment; and he thereupon preſented a bill of ſuſpenſion to the Court of Seſſion. When this cauſe came firſt to be heard, the Court, before determining the principal queſtion, directed the reſpondents and the other copartners to condeſcend

condeſcend and inſtruct how the ſaid copartnerſhip was managed before, and how after, they renounced their ſhares; and ordained the appellant to condeſcend and prove if any part of the ſhares of the reſpondents (or other partners reſigning) was unpaid, and what the ſame was; and if the ſaid copartners had any effects of the ſaid ſociety in their own hands not accounted for, and what the ſame was at the time of their foreſaid renunciation.

A proof was accordingly taken; the import of which as ſtated by the reſpondents was, that it appeared that before the time of the reſignation of the reſpondents, the affairs of the ſaid glaſs-manufactory were managed by a committee of the ſociety in general, but after their reſignations the appellant managed all by himſelf, and he alone gave a commiſſion to Mr. Smith to act as overſeer of the works; and Mr. Smith deponed, that as the commiſſion was given by the appellant alone, ſo with him only he treated, and with no other of the ſociety; and the appellant ſolely managed, bought and ſold every thing of the ſaid manufactory by himſelf, he only paid the charges and applied the profits to his own uſe. The appellant did not examine any witneſs to prove his allegations, and the term was circumduced againſt him.

The cauſe coming to be heard before the Lord Ordinary, his lordſhip in 1705, found it inſtructed by the writs produced, "that the reſpondents had paid their ſhares, and allowed the ap- "pellant, notwithſtanding of the circumduction of the term, to "prove by the reſpondents' oaths the having of any writs or "books belonging to the ſociety, and ordained the reſpondents "to produce any ſuch as they ſhould acknowledge by their oaths, "but found it not clearly proved by the reſpondents' renuncia- "tion, and the appellant's acceptance, that the appellant was "obliged to releaſe the reſpondents of the debts of the ſociety, "unleſs the ſame be inſtructed *aliunde*.

About this period Livingſtone, one of the partners, made over his claims to the reſpondent Burton: the action was afterwards diſcontinued for upwards of ten years; but being again revived, the Court, in abſence, gave judgment againſt the appellant, confirming the original decree of the ſheriff of Edinburgh. The reſpondents thereupon gave him a charge of payment; and arreſted the rents in the hands of his tenants. They alſo brought a proceſs of forthcoming: and in that action, the appellant appeared for his intereſt. The Court in June 1717 adhered to their former decrees, and ordained the tenants to make payment in terms thereof.

The appellant preſented another bill of ſuſpenſion, contending that he and his tenants were forced to pay theſe ſums without any legal proof of their being due; and he produced bonds and other writings by which, he contended, it appeared, that the reſpondents were at the ſame time debtors to the appellant in far greater ſums than thoſe claimed by the reſpondents. The Court on the 12th of July 1717 found it proved, that the ſhares of the above

above "glaſswork belonging to the reſpondents were by them "ſold to the appellant on the 21ſt of October 1699, and that "the ſaid ſhares were bought and accepted at that time by the "appellant, and were thereafter managed by him as his own, "and remitted to the Lord Ordinary to hear upon what further "remained to be determined."

The appellant reclaimed, and after anſwers for the reſpondents the Court on the 14th of November 1717, "having conſidered "the ſaid cauſe with the ſederunt of the partners of the 21ſt of "October 1699, and the factory granted by the appellant in "1700, to the ſaid Smith, found it proved that after the ſaid "ſederunt, the appellant acted and managed as proprietor of the "ſhares in the ſaid glaſswork, which belonged to the reſpondents; "and therefore found that the appellant was obliged to accept of "the diſpoſition of the ſaid ſhares, and that he was obliged to "make payment to the reſpondents in terms of the ſaid ſede-"runt, and decerned accordingly." And to this interlocutor, the Court adhered on the 27th of December 1717, and the 15th and 21ſt of January 1718.

Entered, 8 Feb. 1727-28.

The appeal was brought from "a decree of the ſheriffs of "Edinburgh of the 2d of October 1700, and of two ſeveral in-"terlocutors of the Lords of Seſſion of the 12th of July, and "14th of November 1717, and others in the cauſe."

Heads of the Appellant's Argument.

The reſpondents contended, that they had proved their reſignations, and the appellant's acceptation thereof, both by an act of ſederunt, or meeting of the company, and by the depoſitions of ſome witneſſes. But that pretended meeting conſiſted chiefly of the reſpondents, who had entered into a concert to withdraw at the ſame time, and the depoſitions are of the ſame ſort; beſides the pretended act of the meeting is ſuch as never was offered in evidence in any court, being croſſed and cancelled in whole paragraphs; which if it had been ever ſo regular, could never have bound the appellant, unleſs he had either ſigned his acceptance at the ſame time, or had had the ſhares made over to him, by deeds in writing, as is uſual in matters of conſequence, by the law of Scotland, before which there is *locus pœnitentiæ* allowed in any treaty or agreement.

Had it been proved (as it never has) that the reſpondents had reſigned, and that the appellant had accepted regularly, yet it appears very unjuſt to have allowed the reſpondents all the ſums that they themſelves aſſerted they had advanced for the works, without any proof of ſuch advance; and before clearing off the debts due by the company, and before they had accounted for the product of the manufactory, proved to be in their own hands at the time, as public officers of the company and otherwiſe; and before any account of the partnerſhip was taken or ſtated.

The ſaid decrees ordained the appellant, not only, to pay the aforeſaid ſums, but likewiſe intereſt for the ſame, whereas there

there is no intereſt due upon any ſums, except where the ſame is ſtipulated by the parties, or ordered by expreſs law; eſpecially where the account is not liquidated.

It appeared in court by bonds and other authentic documents, that the reſpondents were debtors to the appellant in far greater ſums than thoſe claimed (had they been ever ſo juſt) and ſo theſe claims were *ipſo jure* extinguiſhed by compenſation.

The reſpondents objected, that compenſation is denied by act of Parliament, if the ſame be neglected to be proponed by the party before the decree be entered; which being the appellant's caſe, he therefore could not have the benefit thereof. But the firſt decree complained of was in the appellant's abſence, when he was engaged in the ſervice of the government; which was the reaſon of his preferring ſo many bills of ſuſpenſion afterwards, in which he fully inſtructed his grounds of compenſation, and even where the law denies compenſation, in moſt caſes it allows of retention to ſtop execution, being matter of diſcharge, eſpecially where it is evident, as in this caſe. Where a perſon having a ground of compenſation, is refuſed the ſame, it is in effect likewiſe to refuſe all action upon the ground of debt, be it ever ſo juſt, becauſe the party againſt whom the compenſation was to operate may not be able to allow ſatisfaction any other way. 1592. c. 143.

Heads of the Reſpondents' Argument.

The appellant contended, in the court below, that the original contract of co partnerſhip was blank in ſeveral particulars, eſpecially as to the quantity of capital ſtock, and that the writer and witneſſes were not deſigned, which was neceſſary by law. But this being a contract in relation to merchandize *is uberrimæ fidei*, and the ſolemnities in other writings are not required in ſuch deeds; eſpecially where the ſame have been followed out by ſeveral parties, by acting according to the ſame; and as to filling up the capital ſtock, that could not be, ſince it was not certain how many ſharers or ſubſcribers they might have.

With regard to the obliteration of the minutes of federunt founded on by the appellant; there is no queſtion, but the federunts of all companies or ſocieties, when legally ſigned, are probative for or againſt any member of the ſociety, eſpecially ſuch as were preſent, who, if any thing material had been omitted, had an opportunity of having it rectified; and in this caſe there was no direction for any writing more ſolemn to be made uſe of where the ſhares of the ſociety were transferred from one partner to another. And the appellant certainly looked upon this reſignation as marked in the minutes as ſufficient, ſince he after that time took upon himſelf the ſole management of the glaſs work, without ever conſulting the reſpondents, or the other reſigning partners, and did likewiſe under his hand declare, he had right to the reſpondent Smith's ſhare; and he had no other right but the ſignation made in the ſaid federunt. The obliteration was only two proteſts taken by the appellant and the reſpondent Smith

as

as to the method of management, through which a line was drawn as unneceſſary after they had agreed to reſign their ſhares.

The appellant objected, that the reſpondents had not paid up their ſhares: But that they had, appears by the receipts of the treaſurer to the ſociety, who was legally authorized to receive the ſame.

He objected alſo, that the reſpondents ought to bear their proportion of the debts owing by the co-partnerſhip prior to their reſignation: but it were very unreaſonable, that the reſpondents ſhould be anſwerable for the partnerſhip debts, ſince they had upon terms parted with their ſhares to the appellant, who upon that account got all the co-partnerſhip ſtock into his hands, which muſt and ought to be the fund for payment of theſe debts.

Judgment, 8 April 1719. It is ordered and adjudged, *That the ſaid petition and appeal be diſmiſſed; and that the decree and interlocutors therein complained of be affirmed: and it is further ordered, that the ſaid appellant do pay, or cauſe to be paid to the ſaid reſpondents the ſum of* 20l. *for their coſts in reſpect of this appeal.*

For Appellant, *Tho. Lutwyche. Pat. Turnbull.*
For Reſpondents, *Rob. Raymond. Will. Hamilton.*

Caſe 55. Stair, 25 Feb. 1669. William Brown, Merchant in Edinburgh, and Andrew Roſs, Maſter of the Woollen Manufactory at Muſſelburgh, *Appellants;*
Robert Earl of Morton, - - *Reſpondent.*

3 *Feb.* 1719-20.

Kirg's annexed Property.—A perſon, to whom part of the annexed property had been granted, creates a heritable ſecurity thereon: his grant is afterwards reduced, and the decree confirmed by an act of reannexation: an act of diſannexation is ſubſequently made, and a new grant of part of the premiſes paſſed to the repreſentative of the family of the original grantee, though not his heir: this does not revive the heritable ſecurity granted by him.

Coſts.—60*l.* coſts given againſt the appellants.

THE lands and lordſhips of Orkney, Zetland, and the Iſles thereto belonging, formed part of the annexed property of the crown. In 1643, King Charles the 1ſt, being indebted to William then Earl of Morton, in divers ſums of money, lent to and diſburſed for his majeſty, by charter under the great ſeal of Scotland, granted and conveyed to the ſaid earl and his heirs, the Iſles of Orkney and Zetland redeemable on payment of 30,000*l.* ſterling. By virtue of this charter the earl was infeft; and the ſaid grant was ratified in Parliament: but no previous act of diſſolution was obtained.

In 1647, the ſaid earl and Robert Lord Dalkeith his ſon, granted an heritable ſecurity over the ſaid Iſles, to Sir William Dick

Dick of Braid, and Sir Andrew Dick his ſon, for ſecuring repayment of 5570*l.* ſterling lent to the earl. And upon the earl and his ſon's reſignation, a charter was procured by Sir William and Sir Andrew, under the great ſeal, upon which they were duly infeft. Upon the credit of this heritable ſecurity Sir Andrew Dick contracted ſeveral debts, and gave proviſions to his children out of the ſame.

In 1662, King Charles the 2d made a general revocation of all grants made by any of his predeceſſors of any part of the annexed property of the crown; which revocation was confirmed by Parliament. Soon afterwards his majeſty made a new grant of the foreſaid Iſles to the Viſcount Grandiſon, for the honourable aliment, ſupport and dignity of the family of Morton. But in 1668 an action was brought by his majeſty's advocate, in the Court of Seſſion for reduction of the grants which had been made of the ſaid Iſles, upon the ground that they were part of the annexed property of the crown, and that the king could not alienate or grant away the ſame, but for good cauſes firſt adviſed in Parliament, nor till after an act of Parliament obtained for diſuniting the ſaid poſſeſſions from the crown. In this action decree of reduction was accordingly obtained, and that decree and all the acts of annexation were afterwards ratified and confirmed by an act of Parliament 1669. c. 13.

Sir Andrew Dick and his children being thus defeated of their ſecurity upon theſe lands, made their application to his majeſty king Charles the Second for ſubſiſtence, till his majeſty ſhould grant a reference for accommodation of the principal ſum on the ſaid heritable ſecurity; and the king made an allowance to them of the yearly ſum of 132*l.* ſterling out of the exchequer of Scotland, ſtill reſerving the conſideration of the ſaid principal ſum. This allowance was, upon the recommendation of their caſe from the Parliament of Scotland, continued to them by king William, and afterwards by queen Ann, till the union.

In 1693 and 1702, James late earl of Morton applied by petition to the Parliament of Scotland complaining of the ſaid decree, and praying that the ſame, with the act of Parliament ratifying that decree, might be reverſed; but his petitions were rejected, and he obtained only recommendations to the crown to conſider the hardſhips complained of.

In 1707 another application was made by the late earl of Morton to the Parliament of Scotland, repreſenting the misfortunes of his family, and praying, for the preſervation of an ancient houſe, which he was willing to owe to the queen's bounty, that her majeſty might be empowered to make him a new grant of the premiſes. Her majeſty having ſignified her ſatisfaction that ſuch an act might paſs, an act was accordingly paſſed in the Parliament of Scotland, reciting the earl's former applications and the recommendations of the Parliament thereupon; and "that her "majeſty having conſidered the ſame; and being convinced of "the hardſhips and ſtretches therein mentioned, whereby the "earl and his family were very greatly leſed, and being willing

"to

" to ſhew at once a mark of her royal juſtice and favour to the " ſaid earl and his family; therefore her majeſty with advice " and conſent of the eſtates of Parliament, did diſſolve from the " crown all the ſaid earldom of Orkney and lordſhip of Zetland, " and lands thereto belonging, to the effect her majeſty might " diſpone to the ſaid earl of Morton, his heirs and ſucceſſors, the " ſaid earldom, lordſhip, and lands, or any part thereof, redeem- " able by her majeſty and her ſucceſſors on payment of 360,000l. " Scots money, the ſaid earl paying yearly to her majeſty and " her ſucceſſors, during the not redemption, 6000l. Scots money " in name of feu farm, and 1600l. Scots money to the mini- " ſters of Orkney." Purſuant to this act of Parliament, her majeſty gave part of what was contained in the firſt grant to the earl under the ſaid rent-charge, and ſeveral other burdens; and the grant was ratified in Parliament.

The repreſentatives of Sir Andrew Dick, conceiving that this grant revived their right to the heritable ſecurity on the premiſes, and rendered the grantee liable to make ſatisfaction for that debt, his daughter, Elizabeth Dick, being a creditor to her father by a bond of proviſion for a conſiderable ſum of money, and James Dunbar, her huſband, obtained a decree of adjudication, on the ground of the ſaid heritable ſecurity. Having afterwards aſſigned this adjudication and all their right to the appellants, they thereupon brought an action of mails and duties before the Court of Seſſion againſt the tenants of Orkney and Zetland, to compel payment of their rents to the appellants.

The ſaid James, late earl of Morton, appeared and made defences to this action. Pending the action he died, and his brother, the reſpondent, was made party thereto.

The Court, on the 29th of January 1718, found, " That the " ſaid act of diſſolution, and queen's gift, proceeded and was " granted *per modum gratiæ*, and not *modum juſtitiæ*; and there- " fore found, that the right granted by the earl's predeceſſors in " favour of Sir Andrew Dick, did not thereby revive, and re- " mitted to the Lord Ordinary to proceed in the cauſe accor- " dingly." And to this interlocutor the Court adhered on the 21ſt of February thereafter. The cauſe being called before the Lord Ordinary, his lordſhip, on the 28th of February, " pre- " ferred the ſaid earl on the rights produced to the mails and " duties libelled." The appellants having reclaimed, the Court, on the 17th of June 1718, " refuſed the deſire of the petition, " and adhered to the Lord Ordinary's interlocutor."

Entered, 18 Dec. 1719.

The appeal was brought from " ſeveral interlocutory ſen- " tences, or decrees, of the Lords of Seſſion in Scotland of the " 29th January, and 21ſt February, and alſo from an interlo- " cutor of the Lord Ordinary of the 28th of the ſame February, " and from another interlocutor of the ſaid Lords of the 17th of " June 1718."

Heads

Heads of the Appellants' Argument.

It appears by the nature and tenor of the earl's new grant, that it was a reſtitution to the rights of his predeceſſors, and that by way of juſtice, ſince the act expreſsly mentions, that her majeſty was convinced of the hardſhips and ſtretches done to his predeceſſor, by the decree in 1669, and the act following thereon, *whereby he and his family were very greatly leſed*, and was willing to do an act of *juſtice as well as favour* to the ſaid earl, ſo that it could no way be properly called an act of mere favour. The earl having claimed and got back the eſtate of his predeceſſors, upon a narrative of hardſhips and injuſtice done to them, he cannot by this new grant exclude and bar the appellants, whoſe debt was ſo fairly contracted and ſecured to them by the ſaid heritable right and infeftment, whilſt the right of the ſaid eſtate was in the perſon of his predeceſſor. The ſaid earl's grant could only ſubſiſt upon the head of juſtice, and not of favour, becauſe by the ſaid act in 1669, whereby the ſaid eſtate was annexed to the Crown, it is expreſsly declared, "That if at any time thereafter it ſhould "be thought fit to diſpone or grant any right to any part of the "ſaid earldom and lordſhip, the general narrative of good ſer"vices, weighty cauſes and conſiderations, ſhould not be ſuffi"cient; but the particular cauſes and conſiderations whereupon "his majeſty and his ſucceſſors might be induced to grant, and "the eſtates to conſent to ſuch rights, ſhould be expreſſed, and "that all diſpoſitions which ſhould be granted contrary to that "act ſhould be void and null." So that unleſs the ſaid earl's new grant proceeded upon ſome other grounds than mere favour it could not be effectual to him.

Heads of the Reſpondent's Argument.

The appellant's demand might have been a charge upon the premiſes, in the hands of the firſt grantee, who was the original debtor; yet that will not charge the reſpondent, who is not repreſentative of the ſaid grantee, nor has any eſtate or effects deſcended from him. If he were ſuch repreſentative, no doubt he muſt have been liable by virtue of the perſonal obligation of the ſaid Earl William to pay the money; and though the reſpondent be in poſſeſſion of the premiſes, yet it is not as claiming under the firſt grantee, but by virtue of a free gift made by her late majeſty, with conſent of the parliament of Scotland, to the ſaid James Earl of Morton, deceaſed.

The act of parliament, which is the foundation of the reſpondent's late grant, does mention hardſhips and ſtretches uſed againſt the earl's predeceſſors by a rigorous execution of the law, but does not ſpeak of injuſtice, or ſay that the decree of 1669 was contrary to law, nor does it reverſe or ſet aſide that decree; and though it might be a hardſhip and ſtretch of the law in making ſaid a right granted to the Earl of Morton for a valuable conſideration of money lent as well as for good ſervices done to the crown, yet ſtill the law ſtood againſt the grant, and no injuſtice

was done. Though her majeſty was to ſhew a mark of her royal juſtice as well as favour, that juſtice was not exerciſed in ſetting aſide the decree of 1669, but in her conſenting to the act of diſſolution of the premiſes from the Crown, to enable her to reward the ſervices done by an ancient family.

The act ratifying the decree of 1669 is reduced only in ſo far as it might be prejudicial to the grant to be made. that is in ſo far as that act did annex the premiſes to the Crown, but not in ſo far as it ratified the decree; and, therefore, that decree ſtands unreverſed to this day; and of conſequence the firſt grants made to the Earl of Morton in 1643 and 1646, and the heritable ſecurity founded on by the appellants, are void, and not revived. If the parliament, in 1707, had intended to reduce the decree in 1669, they would have proceeded in a judicative way, and the Crown would not have been enabled to make a new grant of the whole or a part of the premiſes, but the old one would have been revived. In fact however the whole eſtate contained in the old grant was not given; the office of admiralty, certain juriſdictions, ſuperiorities, &c. are reſerved, and what is given is under the rent charge of 500*l.* *per annum*; whereas no more was payable by the tenor of the old grants, than a ſilver penny if demanded.

If the old grant had been revived by the new grant, it would have been ſo far from being a royal favour to the Earl, that it muſt have been of very great prejudice to him; ſince not only the premiſes would have been quite exhauſted by the growing intereſt of this pretended heritable ſecurity from the year 1647, but the Earl's other eſtate would likewiſe have been ſubjected to the payment of the appellants' debt by his very uſing of the new grant.

The reaſon of the caution in the act 1669, founded on by the appellants, is plainly expreſſed, that it may appear the ſame is not granted through importunity, &c. So the act does not prohibit or lay a reſtraint upon the Crown's making a voluntary grant, but only that any grant to be made ſhould proceed upon ſpecial cauſes and motives, and if theſe be not expreſſed in this act 1707, it is hard to ſay where to find them, and the act has taken care particularly to recite them.

Judgment, 3 Feb. 1719-20. After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the ſeveral interlocutors, ſentences, or decrees therein complained of be affirmed: And it is further ordered, that the appellants do pay or cauſe to be paid to the reſpondent the ſum of* 60l. *for his coſts in reſpect of the ſaid appeal.*

For Appellants, *Tho. Lutwyche. Tho. Reeves.*
For Reſpondents, *Rob. Dundas. Rob. Raymond. Sam. Mead.*

ir Robert Gordon, of Gordonſtoun, Bart. *Appellant;* Caſe 56.
ames Brodie of Brodie, Eſq; - - *Reſpondent.*

8th *February* 1719-20.

Proceſs—Incident Diligence.—In mutual actions relative to the property of a common, ſeveral witneſſes on both ſides, are examined upon an act and commiſſion; and upon a ſecond diligence others, who had not before appeared, are alſo examined: one of the parties gives in a new liſt of witneſſes, praying a new act and commiſſion, and to have ſome witneſſes re-examined on commiſſion who had already depoued before the Court; but his petition is refuſed.

Coſts.—30*l.* coſts given againſt the appellant.

THE appellant was proprietor of the lands of Drainie, and the reſpondent of the lands of Kinnedour, in the county of oray. Adjacent to the ſeveral eſtates was a piece of moor and eadow land, called the moor of Drainie, to which both parties aimed a right. The reſpondent and his tenants being prevented y the appellant from paſturing the ſame, the reſpondent brought action againſt the appellant before the Court of Seſſion to have declared that the ſaid moor and meadow land were pertinents his lands of Kinnedour, at leaſt that they belonged to him in ommon with the appellant: and the appellant thereupon brought counter action to have it declared that the conteſted ground was pertinent of his lands of Drainie, that the property thereof longed ſolely to the appellant and that the reſpondent and his nants might be enjoined not to diſturb his poſſeſſion of the me. It appears that the reſpondent's ſummons had been firſt ted, but that the appellant's was firſt executed.

After both parties had produced in Court the ſeveral charters, feſtments and other writings by virtue of which each of them aimed, the Court, before determining the import of theſe writgs, by interlocutor on the 14th of February 1718, "allowed both parties to prove by living witneſſes by whom and in what manner the controverted lands had been poſſeſſed, for ſome time paſt, and with conſent of parties granted a commiſſion to" certin perſons "to take the oaths of ſuch witneſſes as the parties ſhould think proper to bring before them upon the ground of the controverted lands to give evidence in the ſaid matter, and ordered their depoſitions to be brought into court the firſt of June following."

Several witneſſes were ſummoned by both parties and deponed on the conteſted premiſes. All the witneſſes who were ſumoned not having appeared, both parties obtained in July 1718 act, ordering thoſe who had not appeared to come and make oath fore the Court. Some of the reſpondent's witneſſes were accordly examined before the Court, and the appellant afterwards preted a petition, ſetting forth that he had received information of ne old witneſſes who might be privy to ſeveral facts in queſtion, whom he was before entirely ignorant, and ſome of whom had n abroad, and had returned home ſince the execution of the

original act and commiſſion; and he prayed the Court to grant a new act and commiſſion for examining the new witneſſes (whoſe names were annexed to his petition,) and likewiſe to re-examine ſome of the witneſſes already examined, ſome of whom had been examined before the Court; and the appellant agreed to have the act and commiſſion reported before expiration of the time already allowed for examining witneſſes. On the 24th of July 1718 the Court "refuſed the deſire of the appellant's petition."

The appellant reclaimed: but the Court on the 29th of July 1718 alſo "refuſed the deſire of the petition."

Entered, 7 Jan. 1718-19. The appeal was brought from "two interlocutory ſentences "or decrees of the Lords of Seſſion of the 24th and 29th days of "July 1718."

Heads of the Appellant's Argument.

When, by the law of Scotland, liberty is given to both parties to examine witneſſes, and a commiſſion is granted for that purpoſe, the examination is not cloſed by the return of the commiſſion, nor is either party barred from adducing further proof until there be an order of the Court for that purpoſe, which is called a circumduction of the term: and ſuch an order is neceſſary before the Court proceed to give judgment, or determine upon the evidence. But no ſuch order was made in this cauſe, and therefore the appellant ought to have been indulged in what he applied for.

Though regularly all the witneſſes ought to be examined, when the commiſſion is executed, yet if new witneſſes be diſcovered, whereof the appellant was entirely ignorant when the commiſſion was executed, it would be very hard if he ſhould be deprived of the opportunity of examining theſe witneſſes, ſo lately come to his knowledge, or ſuch of them as were out of the kingdom, and whoſe reſidence he was not at all acquainted with till after the execution of the commiſſion. It has therefore been almoſt the uninterrupted courſe of the Court of Seſſion to come into ſuch a motion. Lord Stair is an expreſs authority for this: he ſays; B. 4. Tit. 46. § 6. "Yet by ſupplication for more witneſſes, in place of theſe that "are dead, or out of the country, or for witneſſes new come to "knowledge; the party deponing that they are come to know-"ledge ſince the former diligence, will get a diligence againſt "theſe other witneſſes." If a new diligence be to be granted in any caſe, it ought to have been in the preſent, where the appellant was but lately come of age.

The Court of Seſſion have been almoſt in conſtant uſe to grant ſuch commiſſions, and particularly in two caſes very lately; the 3 Dec. 1717. one was *Smith* v. *Heritors of Kinnaird*, where upon an application by a petition from the purſuer, the Court, after witneſſes had been examined, granted liberty for ſummoning new witneſſes not formerly cited, and for re-examining ſome witneſſes who had been formerly examined. In the other, *The Earl of Marchmont* v. *The* 29 Nov. 1718. *Earl of Home*, the Court did the like. So their Lordſhips, both before and ſince the appellant's application to them, have granted to others what they refuſed to him.

This

This ought the rather to have been granted, ſince the appellant agreed to have the witneſſes examined and the commiſſion returned, before lapſing of the time granted to the reſpondent for the examination of his witneſſes.

Heads of the Reſpondent's Argument.

No new diſcovery of witneſſes proceeded from the depoſitions of thoſe already examined, nor was it ſo pleaded for the appellant in the court below. He had formerly ſummoned thirty-five witneſſes to give evidence in the cauſe, many of them his own tenants, who had lived long near to the controverted lands, and as many of them as the appellant thought proper to examine, have made oath upon their knowledge of the limits and boundaries of the ground in diſpute, and how the ſame was poſſeſſed by the reſpondent and his predeceſſors. The appellant too had a ſecond diligence allowed him againſt ſuch of the witneſſes as had not appeared upon the firſt, and theſe were brought to Edinburgh, and deponed before the Court. But their not proving the allegations of the appellant, was the true reaſon of his petitioning the Court for leave to bring in freſh evidence: and the appellant had not been ſtraitened in point of time, for after his action came before the Court of Seſſion, he had eight months to ſummon ſuch witneſſes as he thought fit.

The appellant contended, that ſome of his witneſſes who had deponed, had not been examined, concerning ſeveral facts, which it appeared by the oaths of his other witneſſes that they had particular knowledge of; and therefore thoſe ought to be re-examined upon the ground of the controverted lands, and a commiſſion or warrant granted for that purpoſe. Though the Court indeed ſometimes in extraordinary caſes have directed evidences to be re-examined in their own preſence, for clearing any point that might be doubtful in their oaths; yet they never allow witneſſes, who had deponed before the Court, to be re-examined upon a commiſſion. Three of the witneſſes in queſtion were then alſo in Edinburgh.

After a purſuer's own evidences have deponed, and he has an opportunity of ſeeing the teſtimonies of the evidences brought in for the defender, the Court never allows the purſuer to bring in more witneſſes than he has at firſt made choice of, leſt the one might contradict the other, and thereby be guilty of perjury: and in a parallel caſe, betwixt Mackenzie of Roſend, and Swinton of Strathore, the Court of Seſſion refuſed to grant warrant for ſummoning new witneſſes. 12 June, and 2 July, 1718.

The appellant contended, alſo that ſome of the witneſſes, whom he had diſcovered to be neceſſary for his purpoſe were not in Scotland at the time of the examination, and ſo could not be brought in evidence; and ſecondly, that the appellant could not be barred from further proof until circumduction of the term. But, when the appellant put into Court a liſt of the twelve new witneſſes, it was alſerted for the reſpondent, that ſeven of them were either dead, or none ſuch to be found out; and that the

other five were the appellant's own tenants, whom he could not be ignorant of, and might have ſummoned with the firſt thirty-five witneſſes. To this no anſwer was made. And though there was no circumduction of the term made when the appellant petitioned the Court in July 1718, yet ſuch circumduction was made in December thereafter, before the petition of appeal was lodged; and that interlocutor is not appealed from.

The appellant in the Court below ſupported his allegations by the deciſions of the Court, *Sir John Houſton againſt Cochran of Kilmaronock*, and *Smith againſt the Fewars of Brichen*, in both which caſes the Court allowed the purſuers a warrant for ſummoning new witneſſes. But theſe precedents differ very much from this caſe: that of Sir John Houſton againſt Cochran was in order to diſcover a fraud; and there it appeared that ſome witneſſes pointed out new diſcoveries that might be made by others, which in ſuch a matter it was moſt juſt for the Court to enquire into. But here the facts were all plain, done in the open fields, within a furlong of the appellant's houſe, and he and his tenants were daily witneſſes of the reſpondent's poſſeſſing the ground in controverſy, and ſo could not be ignorant of the proper witneſſes he was to make uſe of. Neither is the caſe, *Smith againſt the Fewars of Brichen*, the ſame with this; for that action was at the inſtance of a miniſter for proving what the defenders were in the uſe to pay yearly to his predeceſſors; miniſters are preſumed to be ignorant of what their predeceſſors poſſeſſed, and by their ignorance their ſucceſſors in office might be deprived of a living. Before any ſuch warrant be granted, even in the moſt favourable caſe, the Court muſt be ſatisfied that it is *res noviter veniens ad notitiam*. The reſpondent is ſufficiently ſupported by the act of Parliament 1672. c. 16. Art. 25. whereby it is ſtatuted, that "there ſhall only be two diligences againſt witneſſes" &c.; ſo that if they appear not to give evidence upon the firſt ſummons there is a ſecond warrant for taking them into cuſtody until they give caution to appear: and he is ſupported, alſo by the acts of ſederunt, by which it is clear the appellant is excluded from all pretence of ſummoning new witneſſes.

Judgment, 8 February 1719-20.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutors, ſentences or decrees complained of in the ſaid appeal be affirmed: and it is further ordered, that the appellant do pay or cauſe to be paid to the reſpondent the ſum of* 30*l. for his coſts in reſpect of the ſaid appeal.*

For Appellant, *David Dalrymple. Rob. Raymond. Will. Hamilton.*

For Reſpondent, *Thomas Lutwyche. Sam. Mead.*

The Commiſſioners and Truſtees of the forfeited eſtates, - - - - *Appellants*; Kenneth Mackenzie of Aſſint, a minor, by Colonel Alexander Mackenzie, his Curator. - - - - - - *Reſpondent*.

Caſe 57.

10 *February* 1719-20.

Act of Parliament, 5 *Geo.* 1 c. 22. *Papiſt attainted of Treaſon.*—The Act 5 Geo. 1 c. 22. having limited a certain time for preſenting exceptions, againſt a forfeiture, a perſon who preſented his exceptions as proteſtant heir of a truſtee could not, after expiration of the time limited reply as proteſtant heir of thoſe for whom the truſt was created. No 1

Truſt Eſtate held for a Papiſt.—An eſtate held in truſt for the Earl of Seaforth, a papiſt, was forfeited to the public by his attainder, and could not be taken up, by the proteſtant heir.

ABOUT the year 1650, George, then Earl of Seaforth, having contracted very large debts, many of his creditors obtained apprifings againſt his eſtates. Afterwards George Earl of Cromarty, and other friends of the family compounded with ſome of the creditors who had recovered the apprifings that were prior and preferable; and theſe apprifings were transferred to them in truſt for the family. Theſe apprifings not being redeemed within ten years, the abſolute property of the eſtate became thereby veſted in them, and many of the creditors were excluded. And the apprifings in the perſons of the Earl of Cromarty and others were conveyed to one Kenneth Mackenzie, and by him again made over to Iſabel Counteſs of Seaforth, as truſtee for the family. This Iſabel afterwards made a conveyance thereof to Kenneth Mackenzie of Grunziard, and died in 1715.

Iſabel Counteſs of Seaforth, had three ſons, Kenneth Earl of Seaforth, who died before her in 1701, father of William late Earl of Seaforth, John, father of the reſpondent Kenneth, and Colonel Alexander Mackenzie, Kenneth's curator. William Earl of Seaforth was a profeſſed papiſt; the reſpondent was next proteſtant heir of the family.

By act of Parliament 1 G. 1. c. 42. the ſaid William, Earl of Seaforth, was among others attainted of high treaſon, from the 24th of June 1715; and by an act 1 G. 1. c. 50. the eſtates whereof any perſon attainted was ſeiſed or poſſeſſed on the 24th of June 1715, were veſted in his majeſty for the uſe of the publick; and theſe eſtates were afterwards veſted in the appellants, to be ſold for the uſe of the publick by the act, 4 G. 1. c 8.

1 G. 1. c. 42.

1. G. 1. c. 50.

4 G. 1. c. 8.

The appellants cauſed the eſtate of Seaforth to be ſurveyed as one of the eſtates forfeited, and veſted in them; but in this they were oppoſed by the reſpondent. After the attainder of Earl William, the reſpondent, Kenneth Mackenzie of Aſſint, was, by his curator Colonel Alexander Mackenzie, ſerved neareſt proteſtant heir to the ſaid Iſabel Counteſs of Seaforth, on the ground of

the attainted Earl's being a papiſt; and claimed the eſtate of Seaforth as belonging to him in property upon that right, excluſive of the right of the ſaid William late Earl of Seaforth attainted.

5 G. 4. c. 22 It being enacted by the act 5 G. 1. c. 22. that it ſhould be lawful to every perſon pretending right to any eſtate ſurveyed by the ſaid truſtees in Scotland, for the uſe of the publick to preſent their exceptions on or before the 1ſt of Auguſt 1719, to the Court of Seſſion in Scotland, two ſeveral exceptions were preſented to that Court againſt the ſurvey of the eſtate of Seaforth. The firſt of theſe was in the name of the reſpondent and his curator, ſetting forth that the eſtate belonged to him in property as proteſtant heir to Iſabel Counteſs of Seaforth; and that William the attainted earl had no manner of title to it. In ſupport of this exception he founded upon the act of Parliament 1700, c. 3., intituled 1 Jac. c. 3. "Act for preventing the growth of popery"; by which it is inter alia enacted, "that no perſon or perſons, profeſſing the popiſh "religion, paſt the age of 15 years ſhall thereafter be capable to ſuc- "ceed as heirs to any perſon whatſomever," &c. And if any perſon or perſons educated in the popiſh religion ſhall happen to ſucceed as heirs to their predeceſſors before the ſaid age of 15 years, they ſhall be obliged to purge themſelves of popery by taking the formula by the act directed before they attain to the ſaid age. And, "if the "ſucceſſion devolve to any papiſt after the age of 15 years; or any "conveyance ſhall happen to be made in their favours to any per- "ſon, whom they might have ſucceeded, or the right be devolved "to them by ſucceſſion or other conveyance before that age, and "they neglect or omit to renounce popery as aforeſaid; then and "immediately thereafter, their right and intereſt in, or by the "aforeſaid ſucceſſion or conveyance ſhall become void and null, "and ſhall devolve and belong to the next proteſtant heir or "heirs, who would ſucceed, if they and all the intervening popiſh "heirs were naturally dead," &c.

The other exception was in the name of Kenneth Mackenzie of Grunziard, the diſponee of Counteſs Iſabel; the appellants made anſwer to this laſt exception, that the diſpoſition to this Kenneth Mackenzie could be of no avail; becauſe Counteſs Iſabel's own titles were truſt rights for the behoof of the family of Seaforth and of the late attainted Earl, as heir of the family, and that therefore ſhe could make no conveyance in prejudice of the family, or in breach of truſt; and that the appellants could now, as come in the right of the attainted Earl compel the heirs of Counteſs Iſabel, or her diſponee to diveſt themſelves of the eſtate, and of their titles which were in truſt only. On the 15th of Auguſt 1719, the Court found "that the right to the nine appriſings in "the perſon of the ſaid Counteſs Iſabel was a truſt for behoof of "the heir of the family of Seaforth; and that ſhe could not diſ- "pone in favour of a third party in prejudice of the ſaid truſt; "and therefore diſmiſſed the exception of the ſaid Kenneth Mac- "kenzie of Grunziard." So far the judgment of the Court was acquieſced in.

In

In the courſe of the debate upon the other exception preſented by the reſpondents, it was contended by the appellants that it now fell to be diſmiſſed being founded upon the ſervice as proteſtant heir to Counteſs Iſabel and that all further exception was barred after the firſt day of the then current month. The Court on the ſaid 15th day of Auguſt 1719, "found the right of "the nine appriſings in the perſon of Iſabel Counteſs of Seaforth "was a truſt for the behoof of the heir of the family of Sea-"forth, (*a*) and found that the exceptant's ſervice as proteſtant "heir to the ſaid Iſabel Counteſs of Seaforth, was a ſufficient "title to found his exception on, he being apparent proteſtant heir "to the family of Seaforth; and found that the exceptant might "reply on his right of apparency as proteſtant heir of the family of "Seaforth, though it were not expreſsly ſet forth in his excep-"tion."

And after ſubſequent proceedings, the Court, on the 18th of the ſame month of Auguſt 1715, "found it relevant and "proven, that William late Earl of Seaforth, was not ſeized or "poſſeſſed of, or intereſted in, or entitled unto the eſtate of Sea-"forth in his own right, or to his own uſe or any other perſon in "truſt for him on the 24th June 1715 years, or at any time "ſince; and that the publick, by his attainder, has no right nor "intereſt in the ſaid eſtate of Seaforth; and therefore ſuſtained "the exception preſented by the ſaid Kenneth Mackenzie of Aſſint "as proteſtant heir, and found, decerned, and declared accord-"ingly."

The appeal was brought from "part of an interlocutory ſen- Entered 15 Dec. 1719.
"tence or decree of the Lords of Seſſion of the 15th of Auguſt "1719, and from the whole interlocutory ſentence of the ſaid "Lords the 18th of the ſame month."

Heads of the Appellant's Argument.

The exception preſented for the pretended proteſtant heir ought to have been diſmiſſed, becauſe it was founded only upon that pretended title of proteſtant heir to Counteſs Iſabel the truſtee, not of proteſtant heir to any of the Earls of Seaforth, for whoſe benefit the Counteſs had undertaken the truſt. As heir to Counteſs Iſabel he could carry no more than the truſt eſtate, which was only a name or the office of truſtee, but he could not carry the right of property, which remained in the heir of the family, and ſo was forfeited by the treaſon of the late Earl William who was the heir of the family.

The ſervice of the reſpondent as neareſt proteſtant heir to Counteſs Iſabel was void, as not being warranted by the ſaid act 1700, in regard that, by that act a ſervice as proteſtant heir to the true proprietor is only allowed; but not a ſervice as proteſtant heir to a perſon veſted in an eſtate merely in truſt for the behoof of another.

(*a*) So far the interlocutor not appealed from.

Though

Though by the act 1700, a profeſſed papiſt is declared incapable of ſucceeding to an eſtate, yet that is not an abſolute incapacity taking place in all events, but is a benefit introduced only in favour of the proteſtant heir, upon the condition that he claim it by ſerving heir; and if ſuch proteſtant heir do not make uſe of the privilege, the full right to the eſtate remains in the perſon of the popiſh heir, who enjoys the profits, can charge it with debt, or alienate it at pleaſure. The reſpondent, the pretended proteſtant heir, never having claimed before the attainder, the right to the eſtate was on the 24th of June 1715, in the perſon of William late Earl of Seaforth, attainted, at leaſt of Counteſs Iſabel, her heir or aſſignee, in truſt for the ſaid late Earl, and ſo remained forfeited by his treaſon. And the reſpondents claiming the eſtate after the attainder was a direct fraud contrived to exclude the right of the publick; ſince if the late Earl of Seaforth had not been attainted he might have barred the pretenſions of the proteſtant heir by ſwearing the formula contained in the act 1700; but he being now attainted, cannot have an opportunity of ſwearing that oath, and ſo it muſt remain uncertain whether he would have ſworn it or not; and of conſequence whether or not he was incapacitated by the act 1700.

Admitting, but not granting that the reſpondents pretended title of proteſtant heir to the Earls of Seaforth were good, yet it is plain that theſe two titles of heir to Counteſs Iſabel, and heir to the Earls of Seaforth, were entirely ſeparate rights to ſeparate eſtates, the one a truſt eſtate, the other a right of property. The exceptant therefore was bound either to have laid his exception upon both titles as conſiſtent; or otherwiſe he could claim no more upon that title of heir to Counteſs Iſabel, but what ſhe herſelf was veſted with, and poſſeſſed of, which was nothing more than a nominal right of truſt; ſo the other right, which is the true right of property, muſt remain with the publick, ſince no exception was preſented on, or before the firſt day of Auguſt 1719, upon any title that could carry that property.

The pretended notoriety of the late Earl of Seaforth's being a papiſt is good for nothing in this caſe, ſince notwithſtanding of ſuch notoriety, it was in his power fully to have ſecured his own right, and to have excluded this proteſtant heir by ſwearing the oath recited in the act 1700; and therefore, it was not only neceſſary to adduce ſome other proof of his being a papiſt than a pretended notoriety: but even ſuch a proof cannot be ſufficient now that the late Earl is excluded from an opportunity of ſwearing the ſaid oath by his attainder, in as ſtrong a manner as if he were naturally dead.

If the exceptant's reaſoning be good, the act of parliament 1700, in place of being an *Act for preventing the Growth of Popery*, would prove the greateſt encouragement to papiſts, and the encreaſe of popery; for papiſts in a good correſpondence with their neareſt proteſtant kinſmen, might thereby enjoy their eſtates to the full extent, commit treaſon at pleaſure, without a poſſibility of forfeiting ſuch eſtates by their treaſons, but would always have a ſecu-

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rity for them by the intervention of the pretended proteſtant kinſmen, and their claiming the eſtate though after an attainder.

Heads of the Reſpondent's Argument.

The act 1700 expreſsly declares, that if the popiſh heir do not renounce popery before his age of 15 years, his right and intereſt *ſhall become void and null, and ſhall devolve and belong to the next proteſtant heir*; to whom likewiſe the rents and profits of the eſtate from and after the popiſh heir's incurring the irritancy are declared to belong. So the very ſame clauſe which makes the popiſh heir's right void and null, at his age of 15 years, grants the rents and profits of the eſtate from that period to the proteſtant heir; and though the act declares that the proteſtant heir's right ſhall be burdened with the debts of the popiſh heir, yet that proviſo is to be underſtood only of ſuch debts of the popiſh heir as were contracted before his excluſion from the ſucceſſion that is before the 15th year of his age. Any other conſtruction muſt render the act of no uſe, for if the popiſh heir had a power to charge the eſtate with debts, after that period, the deſign of the act might be utterly avoided by the papiſt's contracting debts to the value of the eſtate.

The appellants contended that there was no evidence offered that the attainted perſon was a papiſt; but beſides the notoriety of the fact, the verdict of the jury, who ſerved the reſpondent proteſtant heir to his grandmother Counteſs Iſabel, is a legal proof that the late Earl was a papiſt otherwiſe ſuch verdict could not have been returned.

They alſo contended, that the reſpondent could not be ſerved proteſtant heir becauſe the late Earl had two children alive: but the act provides that infants, the iſſue of popiſh parents, ſhall be deemed popiſh; therefore the ſervice is ſtill good, for the children are infants, and under the education of popiſh parents, begotten and born after the rebellion, and their blood attainted.

With regard to the late Earl's power of taking the formula preſcribed by the act within 10 years, this could not be forfeited, it being a perſonal act, which nobody but he could perform.

Counteſs Iſabel was infeft in this eſtate, her right was upon record, nor did there appear any truſt in the deeds under which ſhe claimed; ſince then, ſhe was the only apparent owner of the eſtate, the reſpondent muſt have ſerved heir to her in order to eſtabliſh his right. The truſt was only declared by the judges, after the exceptions were preſented; and though ſhe was but a truſtee, and though the reſpondent ſtood only in her right, yet that truſt could not be for the benefit of the late Earl of Seaforth; for, by the act 1700, he could not poſſibly have any right whatſoever in his perſon, and conſequently the appellants could have none. The truſt was only for the benefit of the heir of the family capable to take, which is the reſpondent; and as the late earl could not have compelled Counteſs Iſabel to diveſt herſelf of the truſt in his favour, ſo neither could the appellants: and as the truſt was not declared till after the exceptions were preſented, and conſequently could not be taken notice of therein, ſo that will not bar

bar him ſtill from inſiſting that though this was a truſt, yet it w a truſt for himſelf, and he was the only perſon who could clai the benefit of it.

With regard to the alleged colluſion, all ſervices are connect with the death of the party ſerved to, and drawn back accordingl and the intervening attainder cannot alter the caſe, ſeeing befo Earl William was attainted he was by the act 1700, diſable from having any right whatſoever in his perſon; and all appea ances of colluſion are excluded by the following facts: That th reſpondent's father had long ſince taken out briefs to ſerve him ſelf neareſt proteſtant heir to Earl Kenneth, which were adv cated to a higher judicatory by the late Earl William and after wards dropt by reaſon of the death of the reſpondent's father which happened ſoon after: that the reſpondent was a minor that his curator was out of the country in the ſervice of govern ment: that the minor's briefs were taken out ſhortly after th Counteſs's death: and that the ſervice could not be ſooner com pleated, becauſe, before the attainder, the ſhire of Roſs, where the Eſtate lies was unacceſſible, being at that time the ſeat of th rebellion.

Judgment, 20 Feb. 1719-20.

After hearing counſel, *the queſtion was put whether the ſaid decees ſhall be reverſed; it was reſolved in the affirmative. Ordered and adjudged, that ſo much of the decree or interlocutory ſentence of the Lords of Seſſion, of the 15th of Auguſt* 1719, *whereby they found "the reſpondent the exceptant's ſervice as proteſtant heir to "Iſabel late Counteſs of Seaforth a ſufficient title to found his exception on, and that the exceptant might reply on his right of apparency "as Proteſtant heir of the family of Seaforth, though it were not expreſsly ſet forth in his exception;" and alſo the whole interlocutory ſentence of the ſaid Lords of Seſſion of the* 18th *of Auguſt, whereby they "found it relevant and proven that William late Earl of Seaforth was not ſeiſed, or poſſeſſed of, or intereſted in, or entitled unto "the eſtate of Seaforth in his own right, or to his own uſe, or any "other perſon in truſt for him, on the* 24th *of June* 1715, *or at any "time ſince, and that the public by his attainder had no right or intereſt in the ſaid eſtate of Seaforth," be reverſed: and it is further ordered that the reſpondents be removed from all poſſeſſion of the eſtate in queſtion which they have obtained, and from the receipt of the rents and profits thereof; and that the ſaid commiſſioners and truſtees for the forfeited eſtates take poſſeſſion and receive the rents and profits thereof, and proceed to execute the powers and authorities in them veſted with reſpect thereto, any right, title, or claim of the reſpondents, or either of them, notwithſtanding.*

For Appellants, *Ro. Dundas, Tho. Reeve.*
For Reſpondents, *Robert Raymond. Dun. Forbes. Will. Hamilton.*

William Moriſon, of Preſton Grange, Eſq; *Appellant;*
Sir William Scott of Thirleſtayn, William Niſbet of Dirleton, and John Scott of Harden, a Minor, by his Guardian, - *Reſpondents.*

Case 58.
Fountainhall, 25 Feb. 1697.
19 Nov. 1702.
30 June 1704.

19th *Feb.* 1719-20.

Huſband and Wife.—A bond, with a clauſe of annual rent, is granted blank in the creditor's name, but delivered to a wife, during the ſubſiſtence of her marriage: the huſband entails his real eſtate on the grantor of the bond, and alſo conveys to him all his perſonal eſtate, but was not privy to ſaid bond: in a competition between the executor of the huſband, and the executor of the wife, the huſband's executor is preferred to ſaid bond: and the wife's executor is ordered to refund what had been paid to her, in her widowhood.

General Diſpoſition.—A general diſpoſition of a man's perſonal eſtate, made in favour of one who had, without the huſband's knowledge, granted a bond to the wife, did not releaſe this bond.

SIR John Niſbet of Dirleton, deceaſed, having iſſue only one daughter, diſpoſed of her in marriage to Sir William Scott of Harden. Of this marriage there was no iſſue; and Sir John Niſbet ſettled his whole real eſtate, worth about 3000*l.* per ann. and alſo conveyed all his perſonal eſtate, *acquiſita et acquirenda*, to the reſpondent William Niſbet, paſſing by his daughter.

Soon after, in March 1688, the reſpondent, William Niſbet, executed a bond for 40,000 merks, Scots blank in the name of the obligee, with a clauſe of annual-rent; and delivered it to Lady Niſbet, the ſecond wife of the ſaid Sir John Niſbet, during his lifetime, or to one Bennet, of Grubbet, on her behalf. This Lady Niſbet was not the mother of Lady Scott, Sir John's daughter.

Sir John Niſbet dying ſoon after inteſtate, an agreement was entered into between the reſpondent William Niſbet and the ſaid Sir John's widow, whereby ſhe delivered up to him the ſaid bond for 40,000 merks, to be cancelled; and he executed a new bond to her for 30,000 merks in lieu thereof. Mutual releaſes were then given, and ſhe at the ſame time executed a deed, whereby ſhe obliged herſelf, that in caſe Lady Scott, Sir John's daughter, ſhould be found to have any right to the ſaid bond of 40,000 merks, that ſhe ſhould then deliver up to the reſpondent William Niſbet the ſaid ſecond bond for 30,000 merks.

Upon this new bond the reſpondent William Niſbet made one payment to the widow of 6000 merks in 1691, and another of 3141*l.* 10*s.* Scots in 1693: and, for the widow's further ſecurity and payment of the ſaid bond, he obliged himſelf to communicate and convey to her two diſpoſitions, by which Sir John Niſbet had made over to him the reſpondent all the eſtate that he then had, or ſhould acquire during his life.

Lady Scott of Harden was afterwards confirmed executrix to her father Sir John Niſbet; and, with conſent of her huſband, brought an action before the Court of Seſſion againſt the reſpondent

dent William Niſbet, and the widow of Sir John, for payment to them of the ſaid 40,000 merks. Soon after the commencement of this action the widow died, and the appellant, her brother and executor, was made party to the ſame.

In this action the reſpondent William Niſbet, in January 1697, was examined upon oath as to the circumſtances of the tranſaction; and deponed, that the ſaid bond for 40,000 merks was granted to the ſaid Sir John's lady during her marriage, and that after the ſaid Sir John's deceaſe, his widow delivered him up the ſaid bond of 40,000 merks, which he cancelled, and in lieu thereof executed a new bond to her for 30,000 merks, of which he had paid ſome part. The Court, by interlocutors on the 6th and 11th of February 1697, decerned againſt the reſpondent William Niſbet for the ſaid 30,000 merks in favour of Lady Scott and her huſband, and found that William Niſbet might have a deduction of what ſums he had paid on the ſaid bond, reſerving a power to Lady Scott and her huſband to claim the ſum ſo to be deducted, from the appellant, as executor of his ſiſter Lady Niſbet, to whom theſe payments had been made; and alſo decerned for the other 10,000 merks, which made the complement of the firſt bond.

The appellant afterwards inſiſted that the bond for 40,000 merks was aſſigned by Sir John Niſbet, the huſband, to the reſpondent William Niſbet, by a general aſſignment made to him of all his perſonal eſtate, goods, and effects, *acquiſita et acquirenda*; but the Court, on the 19th of February 1697, "found that the "bond was not transferred by the diſpoſition granted by the ſaid "Sir John Niſbet to the reſpondent William Niſbet, but that the "ſame did belong to the Lady Scott as executrix to Sir John "Niſbet." And upon the 25th of ſame month, the Court "pre-"ferred the Lady Scott and her huſband to the appellant as to "the ſums in the ſaid bond owing by the reſpondent William "Niſbet." The decree of the Court was ſued to execution againſt the reſpondent William Niſbet, and he was thereby compelled to pay to Lady Scott and her huſband the ſum of 21,267 merks, which with the ſums formerly paid by him to the widow was in full of the bond for 30,000 merks and intereſt; and Lady Scott with conſent of her huſband granted a diſcharge to the reſpondent William Niſbet for the money ſo paid to them, with abſolute warrandice from them their heirs and executors jointly and ſeverally.

Lady Scott and her then huſband, further, brought their action againſt the appellant for the ſums received by his ſiſter the widow; and the Court, by two interlocutors of the 19th of November 1702, and 10th of July 1707, "Ordained the appellant to "refund the ſaid two payments of 6000 merks and 3141*l.* 10*s.* "Scots."

Sir William Scott of Harden dying, his widow was afterwards married to Sir William Scott of Thirleſtayne, her ſecond huſband.

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The appeal was brought from "ſeveral decretal orders of the Lords of Seſſion of the 19th and 25th of February 1697, the 19th of November 1702, and 10th of July 1707." Entered, 14 April 1714.

The appeal was preſented on the 14th of April 1714, and the two interlocutors of February 1697 were then only appealed from; the two others were afterwards added. Great alterations took place afterwards in the ſituation of the parties, before the appeal was finally diſcuſſed. Lady Scott, the daughter of Sir John Niſbet, died, and the eſtate of Harden having come to the heir of entail, of the Highcheſter branch, was poſſeſſed by two minors ſucceſſively: much delay was occaſioned by making theſe different perſons and their guardians or curators parties to the appeal; though the different ſteps taken are not of importance enough to be more minutely taken notice of.

At the time of hearing the appeal, Lady Scott, the daughter of Sir John Niſbet, was dead, Sir William Scott of Thirleſtayne, her ſurviving huſband, being her perſonal repreſentative; John Scott of Harden, the minor, was the heir of entail, and perſonal repreſentative of Sir William Scott of Harden, the firſt huſband of Lady Scott, Sir John Niſbet's daughter.

Heads of the Appellant's Argument.

The bond for 40,000 merks was deſigned by the giver, for the lady herſelf, excluſive of the huſband's right: and the bond was caculated for that purpoſe, viz. by leaving the obligee's name blank, as was then allowed by the law of Scotland, as blank indorſements on bills now are in England; by a clauſe of annualrent, which regularly excludes the *jus mariti* as to the principal ſum; and by depoſiting the bond in a truſtee's hand, not to be delivered to the lady till after her huſband's death, for non-delivery of evidents ſuſpends conveyance of property at any time. It was therefore ſtraining both againſt the deſign of the parties, and the law, to make the ſaid bond for 40,000 merks any part of Sir John Niſbet's eſtate.

If it had been in *bonis defuncti*, (as it was not,) yet the deceaſed having by two deeds diſponed to his heir of entail, all that he had or ſhould acquire during his life; and that diſpoſition having been made over to the appellant's ſiſter in ſecurity, it is evident, that Lady Scott and her huſband could have no pretence of title to it, by virtue of their confirmation. And further, in both diſpoſitions Lady Scott is expreſsly excluded, as being already provided for.

It was objected, That the ſaid bond for 40,000 merks could not be ſaid to be contained in either of the diſpoſitions in favour of the heir of entail, becauſe Sir John Niſbet could not be ſuppoſed to know of it. But in all deeds of a teſtamentary nature, as theſe are, a general clauſe is thrown in of purpoſe to comprehend what may not fall ſpecially under conſideration for the time, and it were of too dangerous conſequence to explain ſuch clauſes, with relation to what might or might not be in contemplation at the making of them. Indeed, it is certain, Sir John could not think

think of the bond in queſtion, when he made thoſe diſpoſitions; for it was not in being till near a year after the laſt of them.

It was objected further, that the laſt general diſpoſition obliges the heir of entail to employ the ſums for particular uſes; and, therefore, that he could not apply it for other purpoſes, by his agreement with Lady Niſbet. That, indeed, may concern the heirs of entail, but no ways the Lady Scott, and her huſband, from whom the eſtate real and perſonal is expreſsly conveyed: and even the heir of entail cannot hinder William Niſbet, from giving bond to whom he pleaſes.

The reſpondents have contended that whether theſe decrees, be reverſed or not, the appellant can never recover his money, becauſe of ſome private tranſactions between Sir William Scott of Harden and his lady; by which, notwithſtanding Sir William had right to the ſums in queſtion, yet Sir William had agreed that theſe ſums ſhould belong to his lady; and that the appellant had releaſed all demands upon her. But, as to the private tranſactions between Sir William Scott of Harden, and his lady, the appellant humbly conceives theſe can never affect him: and as for the releaſe to the lady, it is only for a part of the ſums claimed, and in it the appellant's actions and claims, and even this appeal are expreſsly reſerved againſt all the other reſpondents for the remainder thereof; and if the reſpondents have this or any other matters of diſcharge of the ſums claimed by the appellant, the proper time to object them will be when the appellant brings his action in Scotland, for the payment of his money, which he cannot do till theſe decrees be ſet aſide.

Heads of the Argument of the Reſpondent William Niſbet.

This reſpondent having paid the money by the decree of the Lords of Seſſion to the ſaid Lady Scott and her huſband, where the right of both the parties contending for it was in iſſue he ought at all hands to be ſafe, nor ſhould the appellant have any remedy againſt him eſpecially ſince Lady Scott and her huſband, upon the reſpondent's payment of the money, gave him a diſcharge thereof with abſolute warrandice; and the appellant has, pending this appeal, releaſed the ſaid Lady Scott, who by her diſcharge was obliged to indemnify the reſpondent. Beſides, Sir John Niſbet's widow under whom the appellant claims, obliged herſelf to indemnify this reſpondent in caſe decree ſhould be given in favour of Lady Scott; ſo that the appellant as repreſenting his ſaid ſiſter, can have no claim againſt the reſpondent, ſince that indemnity granted by her muſt be binding upon the appellant.

Heads of the Argument of the Reſpondent John Scott.

Sir John Neſbit deceaſed, could never be ſuppoſed to have aſſigned the bond for 40,000 merks, ſince he knew nothing of it, and it was kept ſecret from him. The firſt deed of aſſignment of his perſonal eſtate expreſsly relates to an inventory, to be left by him, of the bonds due to him; and though an inventory was actually made, yet that bond not being mentioned, the aſſignment could not poſſibly convey it

: to the reſpondent William Niſbet. It is true, the ſecond deed of ſſignment is in general terms, and has no relation to an inventory; ut that does not alter the caſe; becauſe, as that was only a coninuation of the former conveyance, it muſt receive the ſame inerpretation by reaſon of the aſſignor's ignorance, ſo it was grantd with an intention and deſign to have the ſums conveyed, aplied for purchaſing land to be entailed after the ſame manner vith his other eſtate. If this bond, therefore, was aſſigned, then t ought to be laid out, according to the directions in that deed; which plainly ſhews that Sir John Niſbet had no ſuch thing in iew by the aſſignment. This will effectually exclude the widow, or the appellant, who claims under her; for if the bond was aſſigned to the obligor, it was thereby extinguiſhed, and the appellant can claim nothing by it.

The money paid by the reſpondent William Niſbet, to the deceaſed, Sir William Scott and his lady, was applied entirely to the ſeparate uſe of the lady, and ſecurities taken for the ſame in her own name; and ſhe, after Sir William's death, received payment thereof. If, then, the appellant had any action, it muſt be againſt the ſaid lady or her eſtate: but pending this appeal, the appellant has releaſed the ſaid lady, and her huſband the reſpondent Sir William Scott of Thirleſtayn of this appeal, and the grounds thereof, and of all demands againſt them or either of them in their own right, or as poſſeſſing any part of the eſtate heritable or moveable, belonging to the deceaſed Sir William Scott of Harden.

On the part of the reſpondent Sir William Scott there was ſet out the releaſe or diſcharge granted by the appellant, reciting the interlocutors from which he had appealed; and that the reſpondent and his ſaid wife had paid him the ſum of 15,000 merks; therefore the appellant exonered, quit-claimed, and ſimpliciter diſcharged this reſpondent and his ſaid wife, their heirs, executors, and ſucceſſors whatſoever, for themſelves, or as intromitting with any part of the eſtate heritable or moveable that belonged to Sir William Scott of Harden, by whatever right or title, of all actions, purſuit, inſtance, and execution whatever, competent, or that might be competent to the appellant, his heirs, executors, and ſucceſſors, of and concerning this appeal, and grounds whereupon the ſame proceeded and was founded; and of the ſaid appeal itſelf, and grounds thereof, whole heads and articles of the ſame, with all that had followed or might follow thereupon; and of all other claims and demands whatſoever that the appellant or his foreſaids had or might have, any manner of way, againſt this reſpondent and his ſaid wife and their foreſaids, reſerving a power to proceed againſt the heirs of Sir William Scott of Harden, and the reſpondent William Niſbet. And the appellant bound and obliged him, his heirs, executors, and ſucceſſors whatſoever, to warrant, acquit, and defend his ſaid diſcharge to be good, valid, and ſufficient to this reſpondent and his ſaid wife and their foreſaids,

ſaids, for their exoneration of the premiſes at all hands, and againſt all deadly as law will.

Judgment, 19 Feb. 1719-20. After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the ſeveral decretal orders complained of in the ſaid appeal be affirmed.*

For Appellant, *Tho. Lutwyche*, *Dan. Forbes.*
For Reſpondent Wm. Niſbet, *Ro. Dundas.*
For Reſpondent John Scott, *Rob. Raymond.*
For Reſpondent Sir Wm. Scott, *Will. Hamilton.*

Caſe 59. The Commiſſioners and Truſtees of the forfeited Eſtates, - - - - - *Appellants;*

James Duke of Hamilton and Brandon, a Minor, by his Curators and Commiſſioners, - - - - - - *Reſpondent.*

26th *Feb.* 1719-20.

Forfeiture under the Act 1 *Geo.* 1. *c.* 20.—*Thirlage.*—An act of parliament gives to ſubject ſuperiors the forfeited eſtates of their vaſſals: the Earl of Linlithgow being attainted, forfeited to the Duke of Hamilton a mill held of his Grace as ſuperior; but the earl having thirled part of his eſtate, held of the Crown, to this mill, this thirlage was not forfeited to the Duke of Hamilton.

BY an act of parliament 1 G. 1. c. 20. it is, inter alia, enacted, "That if any ſubject of Great Britain, holding lands or tenements of a ſubject ſuperior in Scotland, has been or ſhall be guilty of ſuch high treaſon, or treaſons" (as are mentioned in the act) "every ſuch offender, who ſhall be thereof duly convicted and attainted, ſhall be liable to the pains, penalties, and forfeitures of high treaſon; and his lands or tenements held of any ſubject ſuperior in Scotland ſhall recognoſce and return into the hands of the ſuperior, and the property ſhall be, and is hereby conſolidated with the ſuperiority, in the ſame manner as if the ſame lands or tenements had been by the vaſſal reſigned into the hands of his ſuperiors, *ad perpetuam remanentiam.*" The act likewiſe contains this farther clauſe, "And for preventing of frauds or colluſion in order to evade this act, be it further enacted, that if the ſuperiors, vaſſals, or tenants, to whom the lands, mines, mills, woods, fiſhings, and tenements above-mentioned are declared and ordained to belong, ſhall not, within ſix months, to be reckoned from the time of the attainder of the offenders, reſpectively obtain themſelves infeft, or do diligence, really and without colluſion, for attaining poſſeſſion, in every ſuch caſe the forfeiture ſhall belong to his majeſty, his heirs and ſucceſſors."

By

y another act of parliament, 1 G. 1. c. 32. intitled, " An act attaint John Earl of Mar" and others, it was enacted, " that om and after the 19th of January 1717, James Earl of Linthgow ſhould ſtand and be convicted of high treaſon, and ould ſuffer pains of death, and incur all forfeitures, as a aitor convicted and attainted of high treaſon."

t the time of the forfeiture the Earl of Linlithgow was ſeiſed rtain lands and mills in the ſhire of Stirling, which he held Anne Ducheſs of Hamilton, the reſpondent's grandmother, perior. After the attainder, the Ducheſs of Hamilton, in uance of the act firſt mentioned, brought her action before Court of Seſſion, within the ſix months limited by the act, to n the poſſeſſion of the lands: but ſhe dying, pending the ſaid n, the ſame was revived by the reſpondent, her grandſon and

On the 27th of June 1717, he obtained a judgment, deng his right to the ſaid lands, and decreeing to him the poſn thereof; which he accordingly did obtain.

pon the premiſes there was a mill, called the Mill of Leut, to which the late Earl of Linlithgow, after he had acd it from the Ducheſs of Hamilton, thirled and aſtricted tenants of a great part of his eſtate, though not held of the heſs of Hamilton as ſuperior. The appellants ſeized and yed the eſtate of the Earl of Linlithgow, and among other culars thereof, the thirlage to the ſaid mill of the lands not of the reſpondent as ſuperior.

he reſpondent, in terms of the act 5 G. 1. c. 22. intitled, n act for enlaging the time to determine claims on the forited eſtates," preſented his exceptions to the Court of Seſſion ıſt the ſeizure and ſurvey made by the appellants. After ers for the appellants, the Court, on the 12th of Auguſt), " Found that in virtue of the acts of parliament referred in the exceptions, the reſpondent had right to the property half of the lands of Mumrells, and of the north half of the nds of Leuchart and Brimage, with the half of the mills ereof; and alſo of the ſouth half of the ſaid lands of Leuart and Brimage, and the half of the mills thereof, with the rtinents which are contained and deſcribed in the infeftments the late Earl of Linlithgow, and were by him holden of the ſpondent, and to the rents, profits, and iſſues of the ſaid lands, ills, and others, in the ſtate and condition they were and ſtood on the 24th of June 1715, and in and to the ſaid rents, rofits, and iſſues payable for the ſaid lands, mills, and others, om and ſince that time, with the burden always of a proortion of the debts in terms of the late act of parliament G. c. 22.: and decerned and declared the right and proerty of the ſaid lands and others mentioned in the exceptions nd writs produced, with the whole rents, iſſues, and profits ereof ſince the ſaid 24th of June 1715, and in all time oming, to pertain and belong to the ſaid reſpondent."

he appeal was brought from " An interlocutory ſentence or cree of the Lords of Seſſion of the 12th of Auguſt 1719." Entered 22 Jan. 1719-20.

Heads of the Appellants' Argument.

By the act of parliament 1 G. 1. c. 20. the tenement holden by the vaſſal attainted for treaſon from the ſubject ſuperior, continuing loyal and dutiful, is to recognoſce and return to the ſuperior; which neceſſarily ſuppoſes, that what returns did once belong to the ſuperior, and was given by the ſuperior to the vaſſal. But the toll payable to the mill by the tenants of the eſtate of Linlithgow, and their obligation to grind at the ſame, did not flow from the reſpondent, but aroſe by particular agreement betwixt the late Earl of Linlithgow and his own tenants; and therefore the right of exacting that toll cannot in conſequence of the ſaid act belong to the reſpondent.

No right of vaſſalage or right of ſuperiority can be conſtituted otherwiſe than by mutual conſent both of ſuperior and vaſſal; but ſo it is, that neither the late Earl of Linlithgow nor any anceſtor of his, ever did enter into ſuch a paction or agreement with the reſpondent or his anceſtors, as that the eſtate of Linlithgow ſhould be bound to grind or pay toll at the mill of Leuchart; and that ſuch obligation, and the benefit ariſing from it, ſhould become a part of the tenement holden by the Earls of Linlithgow of the reſpondent.

A vaſſal cannot, without conſent of his ſuperior, bring ſuch a burden or ſervitude upon his tenement holden of ſuch ſuperior, whereby the ſuperior may be hurt if the tenements ſhould return to him by any of the ways that by law they may: and, therefore, the Crown never having conſented to the late Earl of Linlithgow's binding his eſtate to grind at the ſaid mill of Leuchart; when the eſtate returned to the Crown by forfeiture, ſuch a burden or ſervitude cannot lawfully be claimed by the reſpondent to the prejudice of the Crown.

It was contended, that if the late Earl of Linlithgow had reſigned the mill into the reſpondent's hands *ad perpetuam remanentiam*, the tenants of the eſtate of Linlithgow would have continued thirled to the mill. But the appellants poſitively deny this to be law.

It was contended further, that the ſuperior is to have the tenement in the ſame condition that it was at the time of committing the treaſon. If the ſubject of the tenement holden of the reſpondent were improved; as, for inſtance, by rendering the lands more fertile, no doubt the benefit might accrue to the reſpondent: but that is not the caſe; it cannot be admitted, that the toll payable by the tenants of the eſtate of Linlithgow ever became a part of the tenement holden of the reſpondent. The late Earl of Linlithgow might very well bind his own tenants for his own conveniency to grind at his mill for a time, without making that obligation of theirs a part of the tenement holden of the reſpondent, and might have releaſed that obligation to his tenants at pleaſure without conſent of the reſpondent. Theſe are evident proofs that the reſpondent, as ſuperior, had no intereſt in that obligation. And therefore the mill of Leuchart ought to return

return to the reſpondent as it came from his anceſtors, without ſuch a burden upon the eſtate of Linlithgow.

Heads of the Reſpondent's Argument.

The diſtinction raiſed by the appellants, between the value of the lands at the time of the forfeiture, and the time of the grant, ſeems altogether imaginary, and without foundation. The ſtatute, which is the ground of the reſpondent's claim, makes no ſuch diſtinction; on the contrary, it points out the very reverſe. The words of the act are, "that the lands and tenements held "of any ſubject ſuperior ſhall recognoſce and return into the "hands of the ſuperior." Thus the reward given by the act to the ſuperior, is the lands and tenements held of him; and it is the tenure, not the value, which is the rule of what he is to have. And the appellants admit that theſe lands claimed do all hold of the reſpondent. But ſhould there have been any queſtion, the ſubſequent words have removed it: theſe are, "And the pro-"perty ſhall be and is hereby conſolidated with the ſuperiority in "the ſame manner as if the ſame lands or tenements had been "by the vaſſal reſigned into the hands of the ſuperior *ad perpe-"tuam remanentiam.*" Now there can be no queſtion, but if the late Earl of Linlithgow, in place of forfeiting the premiſes in queſtion, had reſigned them into the hands of the reſpondent as his ſuperior, that would have carried the lands of the value they were at the time of the reſignation, and not at the time of the grant by the ſuperior to the vaſſal. For, as to this queſtion, there can be no difference betwixt a reſignation to a ſuperior and a grant to a ſtranger, which would have carried the preſent value; nor can the improvement of the rent by this thirlage make this caſe different from any other improvement whatever. And this the Court in the preſent caſe unanimouſly determined.

After hearing counſel, *It is ordered and adjudged, that the interlocutory ſentence or decree complained of in the ſaid appeal be thus far varied, that as to ſuch lands, wherein the eſtate or intereſt of the late Earl of Linlithgow was forfeited to the Crown, the tenants thereof ſhall not be bound to thirle to, or grind at the mill of the reſpondent, in the pleadings mentioned; and that in all other particulars, the ſaid decree be affirmed.* Judgment, 26 Feb. 1719-20.

For Appellants, *Ro. Dundas. John Willes.*
For Reſpondent, *Rob. Raymond. Dun. Forbes. Will. Hamilton.*

Caſe 60. 1 Peere Williams, 612. Foſter's Crown Law, p. 81.

The Commiſſioners and Truſtees of the Forfeited Eſtates, - - - *Appellants*;
Alexander Gordon of Auchintoule, - *Reſpondent.*

25th *Feb.* 1719-20.

Falſa demonſtratio.—Miſnomer.—Forfeiture under 1 *Geo.* 1. *c.* 42.—Major General *Thomas* Gordon is attainted by act of parliament; and the commiſſioners ſeize the eſtate of *Alexander* Gordon, whoſe deſcription agreed with the attainted perſon's in every thing but the chriſtian name: but upon exceptions taken the ſeizure is annulled.

ALEXANDER GORDON, the reſpondent, was, on the 25th of February 1681, infeft and ſeiſed in fee in the lands of Auchintoule and others in the ſhire of Banff, in Scotland: and one Peter Gordon was, on the 11th of November 1713, infeft and ſeiſed in the lands of Leathers and others in the ſhires of Banff and Aberdeen, and, on the 12th of November 1713, in the lands of Thomas-town and Smallburn, in truſt for the reſpondent.

By an act of parliament, 1 G. 1. c. 42., intitled "An act for "the attainder of George Earl of Mariſchall," &c. it was enacted, that if, amongſt others, Major General *Thomas Gordon, Laird of Auchintoule*, ſhould not render himſelf to one of his majeſty's juſtices of the peace, on or before the laſt day of June 1716, he ſhould ſtand attainted of high treaſon from the 12th of November 1715. By virtue of two other acts of parliament, 1 G. 1. c. 50. and 4 G. 1. c. 8., veſting the forfeited eſtates in the appellants, they ſeized and ſurveyed the ſaid lands of Auchintoule and others, before mentioned, as veſted in them by the attainder of Major General *Thomas Gordon*, Laird of Auchintoule.

Againſt this ſeizure and ſurvey, Katherine Gordon, the reſpondent's wife, by virtue of a factory from her huſband, bearing date in July 1715, in terms of the act 5 G. 1. c. 22., preſented exceptions to the Court of Seſſion, ſetting forth the reſpondent's title to the lands before mentioned; and contending, that he was not attainted by the ſaid act of parliament 1 G. 1. c. 42., there being no ſuch name to be found in that act as Major General *Alexander* Gordon, but only Major General *Thomas* Gordon: and ſhe therefore prayed, that the premiſes might be found to belong to him, excluſive of the appellants.

The appellants made anſwers; and the Court, upon the 20th of Auguſt 1719, "Found that the exceptant Major General "Alexander Gordon, of Auchintoule, was ſeiſed and poſſeſſed "of the lands of Auchintoule and others mentioned in his ex"ception, in his own right; and that he the ſaid Major General "Alexander Gordon did not ſtand attainted by the ſaid act at"tainting George Earl of Mariſchall, &c. and that Major Ge"neral Thomas Gordon, of Auchintoule, mentioned in the ſaid "act of attainder, was not ſeiſed or poſſeſſed of, or intereſted in,

"or

" or entitled unto the ſaid eſtate of Major General Alexander " Gordon in his own right, or to his own uſe, or any other per- " ſon in truſt for him, on the 24th day of June 1715, or at any " time ſince; and that the public, by the attainder of Major " General Thomas Gordon, had no right or intereſt in the ſaid " eſtate of Major General Alexander Gordon of Auchintoule; " and therefore ſuſtained the exception for the ſaid Major Gene- " ral Alexander Gordon of Auchintoule."

The appeal was brought from " a decree of the Lords of Seſſion " of the 20th of Auguſt 1719." Entered, 1 Feb. 1719-20.

Heads of the Appellants' Argument.

Major General Gordon, Laird of Auchintoule, was attainted by the aforeſaid act, who is the reſpondent; and although there may be an error, as to the name of *Thomas* in place of *Alexander*, yet the other additions of *Major General* and *Laird of Auchintoule*, do ſufficiently deſcribe the reſpondent to be the perſon by that act attainted, and cannot be applied to any other perſon alive but to him; and the miſnomer, in ſuch a caſe, where the perſon is otherwiſe fully deſcribed, cannot make void an act of attainder in parliament.

Heads of the Reſpondent's Argument.

It is plain by the act of attainder in the preſent caſe, that Thomas Gordon, Laird of Auchintoule, and not Alexander, was attainted; and it does not concern the reſpondent to ſhew, that there was one Thomas Gordon, Laird of Auchintoule, who might be by that act attainted. Since Thomas Gordon is attainted, it ſeems impoſſible for any Court to transfer that attainder of Thomas to the reſpondent, whoſe name is Alexander. And ſince that act proceeds only to attaint perſons as a penalty for their not appearing at a day by the act limited, how could the reſpondent think himſelf concerned to appear in obedience to that act, where he did not find his name mentioned.

Whatſoever might be ſaid in caſe the chriſtian name had been omitted, and if Major General *Gordon of* Auchintoule had been attainted, cannot concern this caſe; becauſe there the difficulty might be whether the perſon was ſufficiently deſcribed without mentioning the chriſtian name. The caſe is totally different, when the chriſtian name is added, for then the deſignation is full, and denotes a perſon as different from the reſpondent as thereby deſcribed, as Thomas is from Alexander. The miſtake here cannot be rectified by alleging *quod conſtat de perſona*, becauſe ſuch ſuch allegation is directly contrary to the act of attainder, and by the ſame reaſon Alexander might be executed upon a judgment againſt Thomas; and conſequently one man might loſe his life, eſtate, and honour by a proſecution carried on againſt a perſon to him unknown.

After hearing counſel, " it is ordered that the further conſidera- " tion of this cauſe be adjourned till to-morrow, and that all the " judges do then attend." Journal, 24 Feb. 1719-20.

25 Feb. The judges accordingly attending, they were directed to del ver their opinions in relation to the following matter as ſtated them, viz.

" The act of parliament for the attainder of George Earl " Mariſchall, and others, having enacted, ' That unleſs Maj " General *Thomas Gordon*, Laird of Auchintoule, ſhould rend " himſelf to one of his majeſty's juſtices of peace by a day there " ſpecified,' and no ſuch render being made; and all the ſa " additions belonging to the reſpondent, but that his chriſtia " name is Alexander, and not Thomas, ' whether if the reſpon " dent Major General Alexander Gordon, Laird of Auchintoul " had been brought into the King's Bench, and execution praye " againſt him, that Court would have awarded execution again " him?' "

And having conferred together, the Lord Chief Juſtice of th Court of King's Bench delivered their opinion, " That the ſa " Court could not award execution on the act againſt *Alexande* " becauſe in awarding of execution, they muſt purſue the a " of parliament, which is the judgment on which it is to b " founded."

Judgment. It is thereupon *ordered and adjudged, that the ſaid petition an appeal be diſmiſſed, and that the decree therein complained of be a firmed.*

For Appellants, *Ro. Dundas.* *Tho. Bootle.*
For Reſpondent, *Will. Peere Williams.* *Will. Hamilton.*

Caſe 61. Vide No. 57 of this Collection. The Commiſſioners and Truſtees of the Forfeited Eſtates, - - - *Appellants*;
Kenneth Mackenzie of Aſſint, a Minor, by Colonel Alexander Mackenzie, his Curator, - - - - *Reſpondent*.

1ſt *March* 1719-20.

Act of Parliament 5 *Geo.* 1. *c.* 22.—*Papiſt*—*Truſt*—Eſtates forfeited by vaſſa were acquired by the truſtees for a Papiſt ſuperior, but were forfeited agai by the Papiſt's treaſon.

THE reſpondent, the minor, had obtained the judgment of th Court of Seſſion, decerning to him in his character of pro teſtant heir, the eſtate of Seaforth, upon the attainder of the lat earl for high treaſon, but that judgment was reverſed upo appeal (No. 57 of this Collection.) He had alſo made a clai before the Court of Seſſion, founded upon a clauſe in the ac 1 Geo. 1. c. 20. " for encouraging all ſuperiors," &c. for th eſtates of ſix of the vaſſals of the late Earl of Seaforth, who wer attainted of high treaſon, viz. John Earl of Mar, Sir John Ma kenz

kenzie of Cowll, John Mackenzie of Avoch, Alexander Mackenzie of Applecroſs, Alexander Mackenzie of Devockmaluack, and Rory Mackenzie of Fairbairn. The ground of his claim was, that he the reſpondent as neareſt proteſtant heir was the ſuperior of theſe vaſſals; and having remained dutiful and loyal to his majeſty, he had right to the eſtates of the vaſſals attainted in virtue of the ſaid act of parliament.

The Court of Seſſion pronounced ſix decrees in favour of the reſpondent, decerning the eſtates of the ſix vaſſals to belong to him.

The appeal was brought from theſe ſix "ſeveral interlocutory "ſentences or decrees of the Lords of Seſſion, pronounced the 3d "day of September, and 28th and 29th days of October 1719." Entered, 11 Feb. 1719-20.

This appeal was the ſame in its merits as the former; for if the reſpondent was entitled to the eſtate of the Earl of Seaforth, he was alſo entitled to the eſtates of the attainted vaſſals, as a ſuperior remaining dutiful and loyal. And the ſame arguments which were uſed in the former appeal, applied with equal force to the preſent.

After hearing counſel, *It is ordered and adjudged, that the ſeveral interlocutory ſentences or decrees complained of in the ſaid appeal, whereby the Lords of Seſſion found,* "*that the exceptant hath right to* "*the property of the lands of Kairlochue and Reogy which belonged* "*to the late Sir John Mackenzie,*" &c. (*a*) *be reverſed. And it is further ordered, that the reſpondents be removed from all poſſeſſion of the eſtates in queſtion, which they may have obtained, and from the receipt of the rents and profits thereof, and that the ſaid commiſſioners and truſtees of the forfeited eſtates take poſſeſſion and receive the rents and profits thereof, and proceed to execute the powers and authorities in them veſted with reſpect thereto, any right, title, or claim of the reſpondents notwithſtanding.* Judgment, 1 March 1719-20.

In this appeal there appears to have been a diſpute whether or not a ſeventh judgment relative to the eſtate of Sir Donald Mackenzie, attainted, had been pronounced by the Court of Seſſion; the reſpondent produced an affidavit of Colonel Alexander Mackenzie, bearing that he had paſſed from and withdrawn his exception relative to that eſtate before any judgment was pronounced. The Houſe of Lords diſmiſſed the appeal as to that exception, "there being in reality no decree pronounced there-"upon."

This caſe ſhews, that notwithſtanding the *ipſo jure* clauſe of devolution in the act 1700, c. 3. in favour of the proteſtant heir, that the papiſt, where there was no declarator, was entitled to acquire by forfeiture of his vaſſals, and to loſe ſuch acquiſitions by his own forfeiture.

(*a*) Here the other lands, and the ſeveral former proprietors of them, are enumerated.

Caſe 62.
Forbes, 22 July 1712.
Fountainhall, 24 July 1712.

Grizel Lady Sempill, Widow of Colonel Richard Cuninghame deceaſed, - *Appellant*;
Alexander Murray of Broughton, Eſq; - *Reſpondent.*
Et e contra.

4th *March* 1719-20.

Preſumption.—In 1691, a Colonel gives his Lieutenant Colonel a draft on his agent for 250*l.* and alſo pays him 50*l.* in caſh, for which a receipt is granted: in a ſtatement of all the officers' accounts in 1692, the Lieut. Col. takes no notice of the tranſaction in 1691, but mentions that he had received 75*l.* 12*s.* 8*d.* on account of his pay, without ſtating from whom: in an action, after the death of the parties, in 1719, it is held that the draft for 250*l.* was not preſumed to have been paid by the drawee, unleſs it was otherwiſe inſtructed; but that the 50*l* paid by the Colonel was not included in the 75*l.* 12*s.* 8*d.* acknowledged to have been received by the Lieut. Col.

Writ.—An objection made to a receipt between officers, that it was void, being neither holograph, nor having the ſolemnities required by the acts of parliament relative to the teſting of writings, is not ſuſtained.

Was a deed written and executed at Dublin valid, which bore to be "written by Edward Dudgeon, Gentleman?" *ſee note at the end of this caſe.*

THE deceaſed Colonel Richard Cuninghame commanded a regiment of foot in Scotland from the 1ſt of January 1690 to the 1ſt of January 1691, of which James Hamilton was lieutenant-colonel.

The regiment was ſo ill paid during the year 1690, that the money iſſued by the treaſury of Scotland was not ſufficient for ſubſiſting the private men, ſo that they lived in part upon the country where they lay; and the officers received a very ſmall ſhare of the pay due to them. The method of paying the regiment was by precepts or orders drawn by the Lords of the Treaſury upon the Receiver-General, to pay to the colonel the ſums therein mentioned for the uſe of the regiment; and of theſe precepts or orders two were iſſued, but not paid when the regiment was transferred from Colonel Cuninghame to his ſucceſſor Colonel Buckam; one of theſe was for 982*l.*, which was paid on the 22d of January 1691, and another for 732*l.*, not paid till the 29th of June 1691, both to Colonel Cuninghame's agent.

The officers of the regiment conceived that they had a right to the arrears of the ſubſiſtence money for the privates, and on or previous to the 27th of June 1691 ſome arrangement had taken place between the colonel and lieutenant-colonel upon that ſubject. The evidence of this arrangement was an obligation, executed by Lieut. Colonel Hamilton, of the above date, wherein he declares, that he had received Colonel Cuninghame's precept or bill on Hugh Cuninghame, the agent, for 250*l.*, and declares that it, with other 50*l.* to be advanced by the colonel, was upon account of arrears, and obliges himſelf to refund proportionally of that ſum, if any alteration were made in ſtating the accounts of the regiment,

regiment. It appeared by Lieut. Colonel Hamilton's receipt to Edward Bryce, on Colonel Cuninghame's account, that the 50*l.* were paid on the 17th of July 1691.

The payment of the arrears due to the regiment having been ſuſpended, the officers, and among others Lieutenant Colonel Hamilton, in July 1692, aſſigned over to Colonel Cuninghame all their claims for ſervice during the year 1690, to the end that he might ſolicit their payment; and by a back bond of the ſame date, Colonel Cuninghame declares, that the aſſignment was in truſt for the uſe of the officers thereto ſubſcribing, and obliges himſelf to make true, complete, and full payment to each of them according to the ſeveral ſums there ſettled. Annexed to this obligation was a ſchedule or account of the money due to the officers and their companies, &c.; the firſt article of which is in the following words: "Imprimis to the lieutenant-colonel as "ſuch, and captain 252*l.*, whereof received by him 75*l.* 12*s.* "8*d.*, due yet to him 176*l.* 7*s.* 4*d.* Due on the company's ac- "count 255*l.* 3*s.* 4*d.* Reſts 431*l.* 10*s.* 8*d.*" &c.; and it proceeds in the ſame manner with the claims of the other officers. In this tranſaction with all the officers, no notice is taken of the former arrangement between the colonel and lieutenant-colonel.

On the 12th of Auguſt 1693 Colonel Cuninghame aſſigned and conveyed to the appellant, her heirs, executors or aſſignees, all debts, ſums of money, &c. owing to him by bond or otherwiſe. In virtue of this aſſignment the appellant claimed from the Barons of Exchequer in Scotland the arrears due to Lieutenant Colonel Hamilton, and payable out of the *equivalent*. In this claim ſhe was oppoſed by the reſpondent, who claimed the arrears of the lieutenant-colonel by virtue of an aſſignment by the lieutenant-colonel to one M'Culloch on 2d February 1709, which M'Culloch had afterwards aſſigned to the reſpondent.

The Barons of Exchequer certified that there was due to Lieut. Colonel Hamilton a ſum of 196*l.* for his perſonal pay; but his claim on account of the arrears for the privates' ſubſiſtence was entirely ſtruck off. The parties having laid arreſtments in the hands of the commiſſioners of the *equivalent*, theſe commiſſioners brought an action of multiple poinding againſt them before the Court of Seſſion.

The appellant inſiſted that the deceaſed Colonel Cuninghame having given an order or bill to Lieut. Col. Hamilton for 250*l.*, payable by Hugh Cuninghame, and having likewiſe paid him 50*l.* in ready money, in part of his arrears, the appellant as claiming under Col. Cuninghame was entitled to the ſaid certificate notwithſtanding his back bond, in 1692, to account to Lieut. Col. Hamilton for what part of his arrears he ſhould receive; Hamilton, having, as ſhe contended, received from him 104*l.* more than the amount of the certificate from the Barons of Exchequer. The reſpondent inſiſted that though there was a bill drawn for 250*l.* by Col. Cuninghame, yet there was no proof that that bill

Appealed from by Lady Sempill.

On the 23d of December 1718, the Court "found that the "precept drawn on Hugh Cuninghame for 250*l.* ſterling, of "which precept Col. Hamilton owned the receipt in his back "bond, was not preſumed to have been paid by Hugh Cuning-"hame unleſs it was otherwiſe inſtructed." And to this interlocutor the Court adhered on the 17th of February 1719.

The appellant Lady Sempill then inſiſted that in all events, ſhe was entitled to 50*l.* of the arrears, ſince it appeared by Lieut. Col. Hamilton's receipt that the ſame was paid him by Col. Cuninghame. The reſpondent contended that this 50*l.* was a part of 75*l.* 12*s.* 8*d.* allowed in the ſtated account in 1692, and that Col. Cuninghame conſequently had already credit for the ſame.

Appealed from by Mr. Murray.

The Court on the 3d of July 1719, "found that the 50*l.* was "not included in the 75*l.*," and to this interlocutor the Court adhered on the 17th of the ſame month.

Appealed from by Lady Sempill.

And on the 2d of December 1719 the Court found "that the "reſpondent Mr. Murray had right to the certificate of Lieut. "Col. Hamilton for the ſum of 196*l.* deducting therefrom 50*l.* "ſterling allowed and found due to the appellant Lady Sempill, "and found that ſhe had right to the ſaid 50*l.* and intereſt thereof, "and that the reſpondent Mr. Murray had right to the intereſt "of the ſum found due to him, and preferred them reſpectively "in the above terms."

Entered, 18 Dec. 1719.

The original appeal was brought from "two interlocutory ſen-"tences or decrees of the Court of Seſſion of the 23d December "1718, and 2d of December 1719:"

Entered, 23 Jan. 1719-20.

And the croſs appeal from "two interlocutory ſentences or de-"crees of the Lords of Seſſion of the 3d and 17th of July 1719."

On the Original Appeal.—Heads of the Appellant Lady Sempill's Argument.

Lieut. Col. Hamilton received a precept from Col. Cuninghame deceaſed, for 250*l.* payable by Hugh Cuninghame, and 50*l.* in ready money in part of his arrears. It muſt be incumbent upon the reſpondent to prove that the 250*l.* bill was not paid, ſince it appeared under Lieut. Col. Hamilton's hand, that he had received ſuch bill, and he is taken obliged to account ſo as to repeat the whole, or a proportion in the certain events therein mentioned.

There are ſeveral very pregnant preſumptions, that the ſaid ſum of 250*l.* was actually paid; for, one part of the money out of which it was to be paid, viz. 982*l.* contained in the treaſury precept firſt mentioned, was at the time of drawing the bill in the hands of the perſon upon whom the bill was drawn, and the other for 732*l.* came into his hands two days after; and the 50*l.* was paid in a fortnight after. From that time till 1709, Col. Hamilton made no demand either againſt Col. Cuninghame or this appellant.

Nor can the ſubſequent tranſaction between the colonel and all the other officers in the leaſt alter the caſe; for it is apparent that the agreement between the colonel and lieut. colonel was

to

to be kept private, to prevent giving umbrage to any of the other officers; and this made it neceſſary to ſtate the Lieut. Colonel's account as it ſtood, without any regard to that private agreement.

Heads of the Reſpondent's Argument.

The receipt granted by the Lieut. Colonel bears a proviſo; firſt, that in caſe the funds and effects out of which theſe two ſums were to be paid ſhould be recalled by the Lords of the Treaſury, then the foreſaid precept for 250*l.* was to become void, and null, and the Lieut. Colonel was to repay the ſaid 50*l.*; and ſecondly, in caſe the officers of the regiment ſhould thereafter procure the ſaid precepts from the Treaſury, to be applied and proportioned towards their payment, then the Lieut. Colonel was to reſtrict the ſaid ſum payable to him proportionally with the other officers. And that the Lieut. Colonel did not get payment of that precept from Hugh Cuninghame the agent, is clear by vouchers given into the Court, by the appellant herſelf, under the hands of ſeveral officers of the regiment, bearing that each of them had received their proportions of the ſums mentioned in the foreſaid precept granted by the Lords of the Treaſury, which exhauſted the amount, ſo that 100*l.* did not remain for the Lieut. Colonel. If the 250*l.* had been paid to the Lieut. Colonel, there is no doubt but Hugh Cuninghame would have taken his receipt for the ſame, as Bryce did for the 50*l.*, and given it up to the Colonel at clearing accounts with him, that the ſame might be brought as a charge upon the Lieut. Colonel's arrears. The appellant prayed for liberty to prove that the 250*l.* was paid to the Lieut. Colonel, and ſix months were allowed by the Court for that purpoſe, but no proof having been made, the Lords circumduced the term againſt her.

By the ſettlement or tranſaction of July 1692, in which the whole officers were concerned, it is plain that all accounts between the Colonel and his officers were then under conſideration and ſettled: for if the 250*l.* precept had been actually paid to the Lieut. Colonel, as well as the 50*l.* paid by Bryce to him, then he had received more than was truly due to him: and it is not to be ſuppoſed that the Colonel would then have given him ſuch a back bond, as before mentioned, without taking the leaſt notice of any former payments.

On the Croſs Appeal.—Heads of the Appellant Mr. Murray's Argument.

The receipt by Lieut. Col. Hamilton to Mr. Bryce for the 50*l.* is void by the law of Scotland, the ſame being neither holograph, nor ſubſcribed before witneſſes, nor the perſon who wrote it deſigned therein.

The receipt does not bind the Lieut. Colonel to hold count for that ſum, but only owns the receipt thereof, and therefore diſcharges the ſame for ever, which imports that this was a debt due by the Colonel to him, and not for his arrears due by the government, which were no debt of the Colonel's.

This

This 50*l.* was certainly part of the 75*l.* 12*s.* 8*d.*. received by him from the Colonel, the law preſuming all partial payments to be included in a poſterior full clearance; and more eſpecially ſince the Lady Sempill never pretended to ſhew from her huſband's or his clerk's books, how that 75*l.* 12*s.* 8*d.* was paid. The appellant's being poſſeſſed of the two receipts does not alter the caſe, the law has not tied the military to obſerve ſuch exact rules in their tranſactions amongſt themſelves in relation to what concerns the management of their pay. And it does not appear from the Colonel's or his agent's books, that the Lieut. Colonel was indebted to him any ſum upon that account.

Heads of the Reſpondent's Argument (*a*).

The 75*l.* 12*s.* 8*d.* ſtated by Lieut. Col. Hamilton as received, regards only what he had received from the Government, and cannot poſſibly comprize the 50*l.* which he received as a private advance from the Colonel, ſince the very intention of aſſigning his arrears to the Colonel was, (amongſt other things) that the Colonel might be re-imburſed the 300*l.* advanced by him to Hamilton, whereof this 50*l.* was a part.

The nature of the tranſaction in July 1692, when the general account was made, did not allow this to be expreſſed, becauſe that general account took the matter as it ſtood betwixt all the officers and the publick, and did not regard private agreements: and it might have broke off that treaty had it been known by the other officers, that the Colonel had been ſo partial to the Lieut. Colonel, as to have advanced him 300*l.* in private, when they could not come at *a ſhilling*.

Judgment, 4 March 1719-20. After hearing counſel, *It is ordered, and adjudged that the ſaid petitions and appeals be diſmiſſed, and that the ſeveral interlocutory ſentences or decrees complained of in the ſaid appeals be affirmed.*

For Lady Sempill. *Rob. Raymond. Dun. Forbes.*
For Mr. Murray. *Ro. Dundas. Will. Hamilton.*

In a former part of the cauſe between the preſent parties, it came to be a queſtion whether the deſcription of the writer of the aſſignation, by Lieut. Col. Hamilton to M'Culloch at Dublin, which run thus "written by Edward Dudgeon gentleman," was valid or not. It appears from Forbes 22d July, and Fountainhall, 24th July 1712, that the deed was was on that ground annulled. It is ſtated, however, in the Dictionary, Vol. II p. 542., that the *deſignation was ſuſtained*, and Forbes's MS. is referred to. From the preſent appeal, it appears that the Court muſt in ſome future period of the cauſe have ſuſtained the deed as valid: and that they had afterwards reverſed the judgments reported by Forbes and Fountainhall.

(*a*) Lady Sempill does not notice the objection to the validity of the 50*l.* receipt.

n Robertſon of Goodlyburn, - - *Appellant;* Caſe 63.
ırge Earl of Kinnoul, - - - *Reſpondent.*

16th *March* 1719-20.

Truſt.—Oath of Party.—A perſon who had conveyed his feu to his ſuperior's ſon having contended that the conveyance was depoſited with a truſtee, till certain conditions were fulfilled: after obtaining the oath of the ſuperior, is alſo allowed the oath of the ſon, the diſponee.
Peer.—A matter referred to a peer's oath.

1695, the appellant purchaſed a feu of the lands of Goodly-urn, and the Hole of Huntingtour, from Thomas Hay of ouſie, afterwards Earl of Kinnoul, the reſpondent's father, he ſum of 3000 merks, to be holden of the ſaid Thomas Hay his heirs as ſuperiors: and the appellant was to pay a feu for the ſame, amounting to about 20*l.* ſterling annually. n his feu-contract he was duly infeft upon the 26th of April ;, and his inſtrument of ſaſine recorded.

he appellant having allowed his feu-duty to run in arrear, the ondent's father brought an action of reduction, improbation, declarator againſt him before the Court of Seſſion, for redu- his ſaid feu-right; and decree in abſence was pronounced nſt him on the 16th of December 1707.(*a*)

'he appellant ſtill continued to poſſeſs the lands. And upon 31ſt of December 1713, he executed a deed renouncing, in ur of the reſpondent, all right, title, intereſt, claim of right, perty, and poſſeſſion, which he had or could pretend to the lands with the pertinents; and he obliged himſelf voluntarily remove from the ſame, and conſented that the reſpondent ıld be at liberty to let the ſame. In April 1717 the reſpon- t gave a notice to the appellant to quit the poſſeſſion of the niſes at Whitſunday then next: and thereupon alſo he brought ıction of removing againſt him in his own baron court. This on the appellant advocated to the Court of Seſſion, and he e ſtated, that the ſaid renunciation had been made upon ns, viz, that the ſuperior ſhould pay back to the appellant the ſaid 3000 merks, which the appellant had paid for the ſaid te; and ſo much for the improvements which the appellant made, as ſhould be found to be juſt by two honeſt men, to nutually choſen by the ſuperior and vaſſal; and, laſtly, that ſuperior ſhould procure from his ſon the reſpondent, in whoſe ur the ſurrender was made, a leaſe of the premiſes to the ap- ant and his heirs for 19 years, upon the yearly payment of the ſaid feu-duty as a reſerved rent:

'hat it was alſo agreed upon betwixt all the parties, when the ender was executed, that the ſame ſhould not be delivered, but

(*a*) In the Journals this interlocutor is ſtated to be of the 16th of February 1707; but the appeal caſes agree in giving the date of December.

only

only lodged in the hands of Sir Patrick Murray of Auchtertyre, a neighbouring gentleman, till the abovementioned terms ſhould be fulfilled to the appellant; but that the reſpondent prevailed upon the truſtee to deliver up the deed to him.

The Court of Seſſion on the 10th of December 1717 "decerned againſt the appellant in the removing." The appellant preſented ſeveral bills of ſuſpenſion, offering to refer the depoſitation to the oaths of the late Earl of Kinnoul, of Sir Patrick Murray the alleged truſtee, and of the reſpondent himſelf, in whoſe favour the deed was made. The Court directed, that the late Earl of Kinnoul ſhould be examined upon oath, and he accordingly deponed that he remembered nothing of any terms of depoſitation. The Court by ſeveral interlocutors on the 5th of March, the 3d of April, the 22d of May, and 7th of July 1718, refuſed the bills of ſuſpenſion, as to the examination of the reſpondent, and Sir Patrick Murray.

Entered, 22 Dec. 1719.

The appeal was brought from "ſeveral interlocutory ſentences or decrees of the Lords of Seſſion of the 16th of December 1707, 10th of December 1717, 5th March, 3d April, 22d May, and 7th July 1718."

Heads of the Appellant's Argument.

The aforeſaid decree of the 16th of December 1707, reducing the appellant's title to his eſtate, being in abſence, when the appellant knew nothing of it; and when he thought he had nothing to fear from his ſuperior, from whom he had ſo lately purchaſed the eſtate, and to whom a very ſmall arrear was due, the appellant conceives can never be ſuſtained, either to carry off his eſtate, of itſelf, or be a valid ground of the aforeſaid renunciation.

The renunciation never having been a delivered deed by the appellant to the reſpondent, it can never diveſt the appellant of his right in the eſtate, and no proof was ever offered to be made by the reſpondent of the delivery thereof; he would only preſume it to have been delivered becauſe it appeared in his hands. But the appellant offered to take off this, and all other preſumptions whatſoever, by referring the whole facts to the oaths of the late Earl of Kinnoul, the reſpondent's father, of the reſpondent, and of the truſtee in whoſe hands the deed of ſurrender was depoſited.

The oath of the late Earl of Kinnoul, without the oath of the truſtee, makes nothing againſt the appellant: his lordſhip does indeed depone, that he does not remember the terms of the ſaid depoſitation; yet in the ſame oath, he refers to the depoſition of the truſtee, who he ſays is an honeſt man and will tell the truth.

As the aforeſaid decrees and interlocutors appear to be contrary to law, they likewiſe ſeem to be very inconſiſtent with equity and juſtice; for though the appellant be by them ſtript of an eſtate and effects to the value of 1005*l.* ſterling and upwards, as appears by the ſtated account herewith delivered (*a*), which was

(*a*) An account of the price and payments, &c. made by the appellant is annexed to his caſe.

his all: yet in none of theſe decrees has the reſpondent ſo much as attempted to ſet forth any true or valuable conſideration for the ſame; further, than that there might (when the ſaid decree of reduction in the appellant's abſence was pronounced) be a year or two of the feu-duty in arrear, amounting to the ſum of 333*l.* 6*s.* 8*d.* Scots money at moſt, too ſmall a purchaſe for the appellant's eſtate, and his many years' labour and expence in improving it. Beſides, the arrears were legally tendered to the ſuperior two years before the decree of removing was pronounced, as appeared from the inſtrument taken thereupon; and the law allows this to be ſufficient to take off any pretence of a forfeiture for non-payment of the feu duties.

Heads of the Reſpondent's Argument.

The reſpondent's father obtained a decree in 1707 againſt the appellant, voiding his right; the appellant, after that, continued to poſſeſs the premiſes as a tenant at will, and paid rent for the ſame; the appellant in 1713 executed a renunciation of all right and title he had to the premiſes, and that renunciation was abſolute without any condition. After that time the appellant has ſtill poſſeſſed as a tenant at will, and has run greatly in arrear, which obliged the reſpondent to bring his action of removing againſt him, whereupon he recovered judgment: and the reſpondent has been kept in law ſuits for ſeveral years, by the appellant a pauper, and the reſpondent will in all events be a very great loſer by the appellant's obſtinacy.

After hearing counſel, *It is ordered and adjudged that the interlocutors and decrees complained of as to ſo much thereof, whereby probation by the oath of the reſpondent is refuſed to the appellant, or which is grounded upon ſuch refuſal, or made in conſequence thereof, be reverſed: and it is further ordered, that ſuch probation be admitted, and that after examination of the reſpondent upon oath, the Lords of Seſſion proceed and decree thereupon as ſhall be juſt.* Judgment, 16 March 1719-20.

For Appellant, *Bat. Turnbull.*
For Reſpondent, *Rob. Raymond.* *Will. Hamilton.*

Caſe 64. The Commiſſioners and Truſtees of the Forfeited Eſtates, - - - *Appellants;*

James Drummond, Son of James late Lord Drummond, and his Truſtees, - *Reſpondents.*

22d *March* 1719-20.

Forfeiture.—Fiar or Life-renter.—A diſpoſition is made by a father, in 1713, to a ſon, then a few months old, of his eſtate, reſerving power to ſell or incumber part for debts already contracted, &c. with concurrence of truſtees; and reſerving the grantor's life rent: in 1714, the father renounced this life-rent. By his attainder for treaſon the eſtate was not forfeited, being veſted in the ſon.

Papiſt.—A child, a few months old, though born of Popiſh parents, might take an eſtate by diſpoſition from his father.

Huſband and Wife.—A life-rent or jointure granted to a wife by her ſon, could not be reſtricted by a miſſive letter executed by her without her huſband's conſent, on which a decree of declarator in abſence had been taken.

ON the 28th of Auguſt 1713, James late Lord Drummond executed in favour of his ſon James, the reſpondent, who was then only a few months old, a diſpoſition of the lands of Drummond, Stobhall, &c. heritably and irredeemably; reſerving to himſelf a life-rent, ſubject to the payment of the annual-rent of the debts and other burdens, of a rent-charge of 500*l.* per annum for life to the Earl of Perth, and a jointure of the like annual ſum to the Counteſs of Perth for life after the Earl's death. Upon this diſpoſition infeftment was taken and duly recorded upon the 13th of December 1713.

By this deed a power was reſerved to the Lord Drummond to ſell any part of the lands for payment of debt, or to grant heritable ſecurities to former creditors, and to ſell any part of the lands that did not lie commodious for the family, for purchaſing others more convenient, ſubject to the ſame uſes: but this power and faculty was not to be exerciſed without the conſent of certain truſtees named in the deed for behoof of the reſpondent. A liſt or ſchedule of all the debts affecting the eſtate was annexed to this diſpoſition: and the Lord Drummond likewiſe reſerved a power to give portions to younger children not exceeding a limited ſum, and to ſettle a jointure on a ſecond wife not exceeding 500*l.* Scots yearly.

By a ſubſequent deed made in the nature of an agreement between the Earl of Perth and his ſon the Lord Drummond, executed upon the 11th of February and 23d of April 1714, the Lord Drummond, in conſideration of an annuity or rent charge of 500*l.* per annum, granted to him during the lives of the Earl and Counteſs of Perth, and 1000*l.* per annum after their deceaſe, ſo long as he ſhould live, parted with his liferent in the ſaid eſtates, excepting the liferent uſe of the houſes and yards of Drummond and Stobhall, &c.; and the Lord Drummond became thereby obliged to cauſe

cauſe the factors on the eſtate to grant bonds to the truſtees named in the firſt deed for the reſpondent's behoof, to apply the rents and profits of the eſtate towards payment of the debts, and of the annuities before mentioned, and of the rent charge to Lord Drummond; and, accordingly, ſuch bonds were executed by the factors to the truſtees.

The Counteſs of Perth had by a miſſive letter under her hand, dated the 15th of November 1694, reſtricted her jointure of 500*l.* payable to her after her huſband's deceaſe to the ſum of 222*l.* 4*s.* 5$\frac{1}{2}$*d.* and the Lord Drummond having brought an action to confirm this miſſive letter, in 1714, obtained a decree of the Court of Seſſion confirming the ſame, in abſence of the Earl and Counteſs of Perth, who were then out of the kingdom.

By the Act 1 G. 1. c. 32. James Lord Drummond was attainted of high treaſon. The appellants thereupon cauſed the whole foreſaid eſtates to be ſeized and ſurveyed. The reſpondents in virtue of the act 5 G. 1. c. 22. preſented their exceptions to the Court of Seſſion, ſetting forth that by the ſeveral deeds before mentioned, the late Lord Drummond the forfeiting perſon was not on the 24th of June 1715, (from which the forfeiture was to take place,) poſſeſſed of, intereſted in, or entitled unto the ſaid eſtate, but that the reſpondent was veſted in and entitled to the ſame, at the time aforeſaid, ſubject to the annuity of 1000*l.* to the Lord Drummond, out of which was payable the 500*l.* jointure, to the Counteſs of Perth, the earl being now dead, and ſubject alſo to his life-rent in the houſes, and parks of Drummond and Stobhall, &c. and conſequently that no more could be forfeited. The reſpondents made anſwers that the conveyance to the reſpondent was only a ſeeming, not a real conveyance; that the reſpondent was disqualified to take the ſame by being a papiſt; and that the jointure to the Counteſs Dowager was by her ſaid miſſive letter and decree of declarator thereon reſtricted to the ſaid ſum of 222*l.* 4*s.* 5$\frac{1}{2}$*d.*

The Court on the 13th of Auguſt (*a*) 1719, "found that the "late Lord Drummond was by the foreſaid diſpoſition of the "28th of Auguſt 1713 years, infeftment following thereon, "regiſtered as ſaid is, and articles of agreement betwixt the Earl "of Perth, and the late Lord Drummond his ſon, dated the 11th "day of February and 3d of April 1714 years, and by the bonds "granted by the Chamberlains, and by the other writs produced "by the reſpondent and his truſtees diveſted of the fee of the "ſaid eſtates of Perth and Drummond, and others therein "mentioned, and that the right of fee, property, and poſſeſſion of "the ſeveral eſtates, and others in the ſaid deeds mentioned, was "before the 24th of June 1715 years veſted and eſtabliſhed in "the perſon of the reſpondent with the burdens of the annuities, "life-rents, and debts therein mentioned, and find that the ſaid con-"veyance in favour of the reſpondent is not voided nor annulled, "by the 3d act of Parliament 1700, intituled 'act for preventing

(*a*) This is the only date ſpecified in the Caſes, though in the Journal it is mentioned that there was alſo an interlocutor of the 11th of Auguſt.

" the growth of popery": and likewiſe found that the miſſive let-
" ter mentioned by the Counteſs of Perth to the late Lord Drum-
" mond, the reſpondent's father, dated the 15th day of November
" 1694 years, being granted *ſtante matrimonio*, without her huſ-
" band's conſent is void and null; and the decree of declarator fol-
" lowing thereon being in abſence, repone the Counteſs againſt
" the ſame: and therefore found and declared, that there only falls
" under the forfeiture of the ſaid late Lord Drummond, an annuity
" of 1000*l.* ſterling yearly, and the life-rent uſe of the houſes and
" yards of Drummond and Stobhall, and the graſs in the parks,
" about the ſaid houſes, when the woods were not under hayn-
" ing; and as many of the flying cuſtoms and carriages, pay-
" able out of the ſaid haill eſtate, as ſhall be neceſſary for the uſe
" of the family; with the burden of the ſaid Counteſs Dowager's
" life-rent of 500*l.* ſterling yearly."

Entered, 18 Dec. 1719.

The appeal was brought from "two interlocutory ſentences or
" decrees of the Lords of Seſſion, pronounced the 11th and 13th
" days of Auguſt 1719."

Heads of the Appellants' Argument.

The ſaid diſpoſition was voluntary and only a ſeeming, not a real conveyance of the fee and inheritance of the ſaid eſtate, contrived to evade the forfeiture; in ſo far as by virtue of ſeveral claims contained in the ſaid diſpoſition, there were reſerved to the late Lord Drummond attainted, as many and as extenſive powers, facilities, and intereſts as he enjoyed by virtue of the fee and inheritance before the making of the ſaid diſpoſition, and ſuch as have by ſeveral decrees of the Court of Seſſion in other caſes been found to eſtabliſh an abſolute right of property or fee ſimple. In the ſaid diſpoſition there is reſerved to him, beſides his life-rent, a power of providing for younger children, and of making a ſettlement on a ſecond wife, a power of charging the eſtate with debts, and of ſelling the ſame or any part thereof irredeemably. There is a clauſe, too, whereby the rights of purchaſers of lands from the ſaid late Lord Drummond, and of creditors who accept of ſecurities upon the eſtate for money lent, are ſecured againſt any objections that might ariſe from a want of a due application of the money advanced by ſuch purchaſers or creditors to the uſes in the diſpoſition mentioned, which renders void the limitation of the exerciſe of the ſaid powers to certain uſes, viz. for payment of debts, &c. and makes the ſaid powers abſolute.

Though the conſent of truſtees was neceſſary to the application of the money, yet the neceſſity of the conſent of the truſtees did not veſt the property in them, nor diveſt the late Lord Drummond of the ſame, and conſequently did not bar the forfeiture upon his attainder. For though a perſon under age cannot ſell lands, or charge his eſtate with debts, without conſent of his guardian; nor an interdicted perſon without conſent of his interdictors, yet as both of them by remaining proprietors would forfeit their eſtates for high treaſon, ſo likewiſe the late Lord Drummond, notwithſtanding

ſtanding the limitation of exerciſing the ſaid power with conſent of truſtees remained veſted in the fee and inheritance of the ſaid eſtate, and thereby could and did forfeit the ſame for high treaſon.

The reſpondent being a papiſt, deſcended of and educated by popiſh parents, was by the act of Parliament 1700, c. 3. "*for preventing the Growth of Popery*," incapable of taking an eſtate by virtue of any voluntary diſpoſition or deed, and the attainted perſon was by the ſame act diſabled from making any voluntary or gratuitous conveyance of any part of his heritage, in prejudice of his heirs, and conſequently he was thereby diſabled from making any deed of conveyance in bar of forfeiture, that being a title preferable to, and excluſive of heirs. And though the reſpondent be under 15 years of age, the clauſe enacting the diſability of taking an eſtate by virtue of a voluntary or gratuitous diſpoſition makes no diſtinction between thoſe who are under, and thoſe who are paſt the age of 15; and there is another clauſe in the ſaid act, declaring that a pupil heir ſhall be reckoned popiſh, if he be under the education of papiſts, as the reſpondent is. So that the ſaid diſability takes place as to the reſpondent, either by admitting, or not admitting the diſtinction of age to take place in the ſaid diſabling clauſe.

The ſaid diſpoſition either conveys a better a right and larger eſtate to the reſpondent than would have deſcended to him after the death of the diſponer, and in that caſe it is null by virtue of the ſaid clauſe diſabling papiſts to take lands by diſpoſition, and it does not devolve to the proteſtant heirs: or it conveys no better right nor other eſtate to the reſpondent and proteſtant heir than a right of ſucceſſion as heir to the eſtate after the death of the diſponer; and in that caſe it is ſubject to all his debts, deeds, and delicts, and therefore it is not ſufficient to prevent forfeiture; the right of ſucceſſion of all heirs, proteſtant as well as papiſt, being barred and excluded by forfeiture for high treaſon. The ſaid diſpoſition would have been void in virtue of the ſecond clauſe, if the father, the diſponer, had lived without committing treaſon till his ſon the diſponee had paſſed the age of fifteen, and continued papiſt: for the proteſtant heir could claim nothing as heir during the life of the diſponer; and it were abſurd to ſay, that a diſpoſition which would become void on the diſponer's not committing of treaſon, ſhould become valid by his attainder for high treaſon.

The agreement, made between the late Lord Drummond attainted and his father, can neither ſupply any of the ſaid defects in the conveyance of the fee and inheritance of the ſaid lands to the reſpondent, nor extinguiſh the life-rent reſerved by it to the diſponer, and much leſs alter any thing with relation to the powers of charging the eſtate with debts and ſelling lands; theſe not being ſo much as mentioned in the ſaid agreement. It is evident by the tenor of this agreement, and the bonds, mentioned in the decree appealed from, to have been granted by the factors appointed by the ſaid late Lord Drummond, that the right of

levying the rents and profits of the said estates, or of appointing factors for that purpose, remained in the said Lord Drummond attainted: and consequently the same is so far from releasing the life-rent, that it proceeds upon the supposition of his continuing to enjoy it, by laying him and his factors under obligations to apply the rents and profits to the payment of debts and other uses in the said indenture mentioned; and that only under the forfeiture of 200*l.* per annum, yielded in the said agreement by his said father out of the annuity due to him, in consideration of an exact application of the said rents and profits to the uses aforesaid.

The missive letter under the hand of the Countess Dowager, and decree following thereon, restricted her annuity to 222*l.* 4*s.* 5*d*^{1}.; and the life-rent of the Lord Drummond ought to be charged with no more than the said restricted sum. This letter having related to a jointure, which was to take place only after the death of her husband, and not to any thing in which the husband could have an interest *jure mariti*, his consent was not necessary. And the husband, as well as she, having been called in the action for obtaining the said decree, and having thereby had an opportunity of appearing by himself or attorney, and to declare his dissent from the said letter, his silence must be construed to import his consent, especially since he had restricted his own annuity. Though the said decree might, because of its having been passed in absence of the countess, be reduced and voided by a proper process at her suit, in case she should prove any thing unjust or iniquitous in it; yet till such suit be commenced, and judgment given upon it in her favour, it is a binding and valid decree, especially since she is no party in this cause.

Heads of the Respondents' Argument.

The late Lord Drummond having charged his estate with great debts, which increased daily by his mismanagement, a few months after the birth of the respondent was prevailed upon by his father and other friends, in order to prevent the utter ruin of the family, to divest himself of the fee of his estates, by the said disposition in favour of the respondent. But although by this deed the late Lord Drummond was fully divested of the fee of the estate, and the same vested in the respondent, if not from the date of the deed, at least from the date of the infeftment thereon; yet the late lord having a life-rent subject to the interest of the debts and other annual burdens, and not being careful in paying those burdens, and having the estate released of them, but misapplying the rents to other uses, the respondent's estate was still in hazard of being swallowed up and entirely exhausted by the growing interest of the debts and arrears of the other annual burdens which the late lord should have paid: and therefore the said agreement was entered into in 1714 between him and the Earl of Perth, restricting the life-rent to an annuity.

The powers which the late Lord Drummond reserved in the deed of 1713, of charging the estate with debt, and even of alienating

ſtring it, were purely perſonal faculties in the forfeiting perſon, which cannot be forfeited or veſted in the Crown for his attainder. Theſe powers, too, were in the perſon of the late Lord Drummond limited to particular ends and purpoſes; ſuch as the providing for younger children and a ſecond wife, and for diſcharging the debts of the eſtate, and purchaſing lands more convenient for the advantage and profit of the reſpondent: and as theſe powers could not have been executed to any other purpoſes by the forfeiting perſon, ſo the Crown in virtue of his attainder can claim no benefit from them. And thoſe powers were alſo limited not to be executed but in a peculiar manner; that is, with the conſent of the truſtees named in the deed: and therefore though all the powers that ſtood in the forfeiting perſon were deemed veſted in his majeſty, ſuch powers could not be executed but with the conſent of the truſtees for the advantage of the reſpondent.

For the appellants it was contended, that though the deed of 1713 ſhould be deemed effectual to convey the fee and property of the eſtate, yet the forfeiting perſon remained poſſeſſed of the lands in virtue of the reſerved life-rent; and that the ſubſequent deed of 1714 being but a perſonal deed, not perfected by infeftment, the forfeiting perſon was not thereby diveſted of his life-rent: and that the reſpondent too, not being a party thereto, could take no advantage from it. But though for creating a life-rent, an infeftment be neceſſary; yet by the law of Scotland, infeftment is not neceſſary for diveſting a perſon of a life-rent, which may be accompliſhed by a ſimple releaſe, ſurrender, or perſonal deed; and by the law of Scotland a life-renter cannot convey his life-rent by an infeftment. By the law of Scotland, rights, obligations, releaſes, &c. may accrue to one perſon by the deed of another, without the privity or conſent of the perſon in whoſe favour ſuch deed is made; and in the preſent caſe the benefit devolved to the reſpondent by a formal indenture betwixt his father and grandfather. In order to extinguiſh the late lord's life-rent, there needed no other party to the deed than himſelf; any writing under his hand declaring that he parted with his life-rent would have been ſufficient.

By the law of Scotland, not he who names the factor is deemed to be in poſſeſſion, but he to whom ſuch factor accounts for the rents and profits; otherwiſe a guardian who names a factor over the minor's eſtate would be deemed to be in poſſeſſion, and not the minor. And, indeed, that was the reſpondent's caſe, he was an infant, his father was his legal guardian or adminiſtrator in law; and if the father as guardian named factors, it appears by the bonds given by them, that they were to account to the truſtees appointed for managing the minor's eſtate for the rents and profits thereof.

The reſpondent on the 24th of June 1715 was an infant of two years of age, and conſequently could not be a profeſſed papiſt, nor could any formula or declaration by which he could purge himſelf of popery be legally tendered to, or refuſed by him.

Though by a ſubſequent clauſe in the act 1700, c. 3. a minor is to be deemed popiſh, when ſprung of popiſh parents, if ſuch minor be under the education of papiſts; yet this clauſe does not concern the caſe of infants receiving diſpoſitions, which is to be governed by the clauſe enacting purgation to be made, but it relates merely to the caſe of minors, who are next in ſucceſſion to popiſh perſons excluded from the heritage of their anceſtors, by neglecting to renounce the Romiſh religion; and therefore it cannot be applied to the preſent caſe.

The Counteſs Dowager appeared voluntarily by her counſel, in the Court of Seſſion, and contended that the reſtriction made by her in the miſſive letter founded on by the appellants, by which her jointure was pretended to be reſtricted, was by the law of Scotland void and null, becauſe it was made during the ſubſiſtence of her marriage without the conſent of her huſband. In ſuch circumſtances, obligations entered into by wives, or deeds done by them, are abſolutely void. Nor was this deed of reſtriction ſtrengthened by the decree referred to: that decree having been obtained in abſence, when the counteſs and her huſband were out of the kingdom.

The reſpondents do admit, that the Court of Seſſion had no juriſdiction, in ſo far as concerns the houſes of Drummond and Stobhall, parks and graſs thereof, in conſequence of judgments given in other the like caſes by the Houſe of Lords.

Journal, 28 March 1719-20. Counſel being firſt heard on the point of the juriſdiction, it is reſolved and decreed that the Lords of Seſſion had no juriſdiction to determine in ſo much of this cauſe as relates to the houſes of Drummond and Stobhall, parks, graſs thereof, and flying cuſtoms; but that they had juriſdiction in the reſt of this cauſe.

Judgment, 22 March Counſel being heard upon the merits, *It is ordered and adjudged that the petition and appeal be diſmiſſed; and that ſo much of the interlocutory ſentences or decrees of the Lords of Seſſion complained of, in which this Houſe were of opinion the ſaid Lords of Seſſion had juriſdiction in determining in this cauſe, be affirmed.*

For Appellants, *Spencer Cowper. Sam. Mead.*
For Reſpondent, *Rob. Raymond. Dun. Forbes. Will. Hamilton.*

With regard to the queſtion of juriſdiction, mentioned in this appeal, it appears that in relation to the forfeited eſtates the Court of Seſſion had determined many queſtions, which they had no title to take cognizance of. By the act of parliament 1 Geo. 1. c. 50. appointing commiſſioners to enquire into and ſeize and ſurvey the eſtates, which the traitors had been "ſeiſed or poſſeſſed "of, intereſted in, or entitled unto," of a certain date, all perſons claiming any eſtate, or intereſt of, into, or out of ſuch eſtates, were directed to enter their claims or demands before the commiſſioners for forfeitures on or before the 24th of June 1717. By another act, 5 Geo. 1. c. 22. all perſons pretending right to eſtates which had been ſeized, and that the forfeiting perſons were not "ſeiſed or poſſeſſed of, intereſted in, or entitled to" the ſame, were to preſent their exceptions to the Court of Seſſion before

before the 1ſt of Auguſt 1719, which Court was to determine the ſame in a ſummary way before the 1ſt of November 1719.

From miſunderſtanding theſe acts, or from ſome other cauſe, the Court of Seſſion allowed exceptions to be brought before them in many caſes, where the forfeiting perſons had been "ſeiſed, or poſſeſſed of, intereſted in, or entitled to" the eſtates forfeited, whereas all claims relative to ſuch eſtates ſhould have been determined by the commiſſioners of forfeitures. The commiſſioners preſented appeals againſt theſe judgments, and in 25 caſes of appeal, in the preſent ſeſſion, the Houſe of Lords, found that the Court of Seſſion had no juriſdiction, and therefore found their judgments null and void. In every one of theſe appeals counſel were called to the bar; but it is probable that caſes were printed in very few of them; the nullity in moſt of them having been acknowledged, and a good many decided at once. Though none of the caſes in queſtion require to be reported as deciſions of the High Court of Parliament on the merits, it appears that ſome of the judgments of the Court below are upon curious points, and all of them little known: they are further noticed at the end of this volume.

On the 15th of February 1719-20, the Houſe of Lords ordered the Court of Seſſion to account for their conduct for judging in cauſes where they had no juriſdiction; and the commiſſioners of forfeitures were ordered to ſtate why they had not pleaded ſuch want of juriſdiction. A report from the Court of Seſſion was preſented to the Houſe of Lords on the 7th of March 1719-20, which at various different times was ordered to be taken into conſideration; but it does not appear from the Journals that any thing was finally done thereon. This report is not mentioned in the acts of ſederunt; but it appears that the Court of Seſſion had great jealouſy of the new court which had been erected, and of the powers granted to the commiſſioners of inquiry.

Acts of ſederunt, 25th June 1717.

Caſe 65. The Commiſſioners and Truſtees of the Forfeited Eſtates, - - - *Appellants;*
Sir Robert Grierſon, of Lagg, Bart. - *Reſpondent.*

30th *March* 1720.

Forfeiture—Tailzie.—A father executes an entail in favour of his ſon; the ſon incurs an irritancy, but before declarator is attainted of treaſon: the Court of Seſſion found that the eſtate returned to the father, though there was no declarator of the irritancy, and that the irritancy was not purgeable:—upon appeal, the judgment was found *null, the Court not having juriſdiction.*

The eſtate being held by the ſon upon a baſe infeftment from the father, the procuratory of reſignation in the hands of the Crown not having been executed, and an act of parliament having declared, that the eſtates of *vaſſals* attainted were to go to *ſuperiors* continuing loyal; the Court upon this act adjudged the eſtate to the father; but their judgment was reverſed upon appeal.

IN October 1713, the reſpondent executed a voluntary ſettlement of his eſtate, in favour of his eldeſt ſon William Grierſon, whereby he conveyed his eſtate of Lagg, to the ſaid William, and the heirs male of his body, whom failing to the reſpondent's ſecond, third, and fourth ſons reſpectively and the heirs male of their bodies, with ſeveral other ſubſtitutions, the laſt of which was to the heirs whatſoever of the reſpondent. By this deed the reſpondent reſerved his own life-rent, and his ſon William, and the other heirs ſubſtituted, were by acceptation obliged to relieve the reſpondent of all his debts: for this latter purpoſe the deed contained a proviſo, that if at any time the reſpondent ſhould be diſtreſſed with horning, or other diligence for payment of debt, upon notice or intimation given thereof to William Grierſon, or the perſon ſucceeding to him, they ſhould be obliged to relieve the reſpondent within ſix months after ſuch notice; and the reſpondent reſerved a power to himſelf to ſell any part of the eſtate for payment of ſuch debt, as he ſhould be diſtreſſed for, to which ſale the ſaid William Grierſon and his ſucceſſors were obliged to conſent; and if they failed therein, ſo that the reſpondent ſhould not be relieved within ſix months after the date of the intimation or notice given, and after the ſigneting of a caption upon a regiſtered horning againſt him, the ſaid William Grierſon and his ſucceſſors were to forfeit their intereſt in the eſtate, and the diſpoſition was to become void, and the reſpondent to return to the right and poſſeſſion of the eſtate with power to diſpoſe thereof as if the deed had never been executed. This diſpoſition contained a procuratory of reſignation for the purpoſe of obtaining new inveſtitures from the crown, the ſuperior, and a precept of ſaſine; in virtue of which precept William Grierſon was infeft on the 29th and 30th of October 1713, and entered to poſſeſſion; but he made no reſignation in the hands of the crown.

The

The reſpondent on the 27th of April 1714, gave notice to his ſon William, that he was liable to be diſtreſſed for debt, and required him to concur in the ſale of part of the eſtate, with certification in terms of the before mentioned proviſo: and the reſpondent continuing to be diſtreſſed by hornings, captions, and otherwiſe, on the 12th of January 1715, renewed the ſaid intimation and requiſition; and on theſe ſeveral occaſions, he took proteſts in the hands of a notary publick.

William Grierſon, having been engaged in the rebellion 1715, was on the 31ſt of May, 1716 convicted and attainted of high treaſon. The appellants thereupon cauſed ſeize and ſurvey his eſtate, as veſted in them for the uſe of the publick from the 24th of June 1715.

Againſt this ſeizure and ſurvey the reſpondent in terms of the act 5 G. 1. c. 22. preſented two exceptions to the Court of Seſſion. The firſt was, that the forfeiting perſon was not on the 24th of June 1715, nor at any time ſince, veſted, in poſſeſſion of, or intereſted in the ſaid eſtate, becauſe his right thereto became void before that time, by neglecting to relieve the reſpondent at the periods when he made requiſition as before mentioned. And that before the 24th of June 1715, the reſpondent was veſted in the abſolute right of the ſaid eſtate by virtue of the conditions in the ſaid diſpoſition. The ſecond was, that ſuppoſing the forfeiting perſon's right to the eſtate to have ſtood good, yet he was infeft therein as vaſſal to the reſpondent; and conſequently by his conviction and attainder the property which was lodged in his perſon was conſolidated with the ſuperiority in the perſon of the reſpondent, by virtue of the act 1 G. 1. c. 20. for "encouraging all ſuperiors" &c.; and that, purſuant to that act the reſpondent had on the 22d of October 1716, obtained himſelf infeft in the lands in queſtion, within ſix months of the attainder. 5 Geo. 1. c. 22. 1 G. 1. c. 20.

The appellants put in anſwers to theſe exceptions, and the reſpondent having produced four ſeveral inſtruments taken by a notary in the matter of the requiſitions and intimations to his ſon, upon which alſo a proof by witneſſes was had, the Court on the 28th of Auguſt 1719, "found it proved that the four inſtru- "ments produced are true in their dates, tenors, and contents, "and that the things in the ſaid inſtruments affirmed to have "been ſaid and done were truly ſaid and done as therein ex- "preſſed; and found that by the facts ſet forth and affirmed by "the ſaid inſtruments, the right of the exceptant's ſon William "was irritated and made void, and that the right and property of "the ſaid lands and eſtate of Lagg and others, deſcribed in the "exceptions and writs to which they refer, had returned to the "exceptant before the term at and from which the eſtates of "traitors were by the act 1 *Georgii* veſted in his majeſty, and "though there was no declarator of the irritancy, and found that "the irritancy was not purgeable: and found that the except- "ant's ſon William was vaſſal to the exceptant, holding the ſaid "lands and others of his father as ſuperior thereof in 1713, and "that the ſaid holding was not changed before his rebellion: and

"found

ſuperiority, and, in conſequence of it, an influence
nd to ſuch vaſſals as were tied to hold of a ſub-
uld not otherwiſe hold of the Crown. And,
has no relation to the preſent caſe, where
no longer tied to hold of the reſpondent
e the reſpondent had no right or influ-
feiting perſon, longer than he thought
the forfeiting perſon's favour by a
ſuch deed remained perſonal.
fon's title or vaſſalage was, in
rliament above recited, ſunk
' conſolidated with his pre-
gnify nothing; for ſtill
power of ſurrendering
ch was in the forfeit-
e forfeited to the Crown;
ight, the appellants would be
by law compel the reſpondent to di-
their favours, for the uſe of the public.
hat by the act every ſuperior is to have the
ned into his hands *ad remanentiam*: and that if
g perſon in this caſe had ſo reſigned into the reſpon-
ands, ſuch reſignation would have given the reſpondent
right to the eſtate. But this is founded on a miſunderſtand-
ing of the clauſe: the act does not ſay that the ſuperior ſhall have
the ſame right as if the vaſſal had made a voluntary ſurrender *ad
remanentiam* into his hands; but that the lands or tenements
holden of the ſubject ſuperior, ſhall recognoſce and return into
the hands of the ſuperior; and then it deſcribes the effects of
that return and recognoſcing, that it ſhall make the property be
conſolidated with the ſuperiority, as if the ſaid lands or tenements
had been reſigned *ad perpetuam remanentiam*. And the difference
lies in this, that if the vaſſal made a voluntary ſurrender, ſuch ſur-
render might by interpretation be conſtrued to be a conveyance or
renunciation of all right the vaſſal had to that ſubject, ſuppoſing
him to have a title diſtinct from the right of vaſſalage derived from
the ſuperior. But in virtue of this clauſe in the act of Parlia-
ment, the tenement being to recognoſce as holden of the ſuperior,
no more does return but the fee or right of vaſſalage: and if the
vaſſal had any ſeparate right diſtinct from it, that is not transferred
to the ſupetior. And ſo in the preſent caſe, ſuppoſing the for-
feiting perſon's right of vaſſalage was ſunk into, and conſolidated
with the right of ſuperiority, yet his perſonal right or diſpoſition
to that very ſuperiority, would remain entire, forfeited by his
treaſon, and would draw along with it the full right to the eſtate.

Heads of the Reſpondent's Argument.

The reſpondent is ſilent in his caſe with regard to the allega-
tion of the appellants that the Court of Seſſion had no juriſdic-
tion to determine on the firſt ground of his exceptions, but enters
into an argument in ſupport of the interlocutor of the Court
founded

" found that in virtue of the act referred to in the exceptions, i
" tituled 'an act for encouraging all ſuperiors,' &c. if the ſa
" William's right of the property of the ſaid lands and othe
" had not been irritated and voided as above, the ſame wou
" have been conſolidated with the ſuperiority in the ſame manu
" as if it had been by the ſaid William reſigned in the exceptan
" hands *ad perpetuam remanentiam:* and therefore decerned an
" declared the full right and property of the ſaid whole lan
" and eſtate of Lagg mentioned in the exceptions and writs pr
" duced, with the whole rents, profits, and iſſues thereof, to pe
" tain and belong to the ſaid Sir Robert Grierſon, the exceptan
" in all time coming."

Entered, 28 Dec. 1719.

The appeal was brought from "an interlocutory ſentence o
" decree pronounced by the Lords of Seſſion the 28th day of Au
" guſt," 1719.

Heads of the Appellants' Argument.

In ſo far as the ſaid decree has relation to the firſt ground o which the reſpondent claims, the appellants conceive the Lords o Seſſion had no juriſdiction to determine in the caſe, the reſpon dent's claim being founded upon a right expectant upon a tailzie eſtate in the perſon attainted, to ariſe upon the breach of a con dition: and therefore the decree ſo far as it is founded on tha poſition, ſhould be annulled (*a*).

The appellants conceive, that that part of the decree which has relation to the reſpondent's claim as ſuperior is erroneous, fo the following reaſons:

The reſpondent was not ſuperior to the forfeiting perſon, no the forfeiting perſon his vaſſal, according to the meaning and na tural underſtanding of the act above recited; ſince by the diſpoſi tion executed by the reſpondent, the eſtate was fully made over t the ſon, the forfeiting perſon, to be holden of the Crown; and although the ſon, for his own conveniency for a time, did poſſeſ the eſtate by infeftment upon a precept or warrant from the re ſpondent, and had not actually made a reſignation of the eſtate into the hands of the Crown, yet ſince he had it in his power t make that reſignation when he pleaſed, and to hold it of the Crown, the reſpondent's claim to the ſuperiority is but an empt name. He was denuded of it at leaſt by a perſonal right which was good againſt him the grantor; and this perſonal right was by William Grierſon's treaſon forfeited to the Crown, and is veſte in the appellants for the uſe of the public.

The act of parliament being intended for encouragement t ſuperiors and vaſſals who ſhould continue dutiful and loyal to hi majeſty, by giving the vaſſals a power to hold of the Crown, whic they could not have had without the benefit of this act, and givin to the ſuperior the right of property of the vaſſal's eſtate, wh ſhould commit treaſon, to be conſolidated with the ſuperiority it is plain the act has relation to ſuch ſuperiors as had a fixed ce

(*a*) *Vide* note at the end of laſt caſe (No. 64.) on this point of the juriſdiction.

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itle to the ſuperiority, and, in conſequence of it, an influence his vaſſals, and to ſuch vaſſals as were tied to hold of a ſub- iperior, and could not otherwiſe hold of the Crown. And, quently, the act has no relation to the preſent caſe, where rfeiting perſon was no longer tied to hold of the reſpondent ie pleaſed, and where the reſpondent had no right or influ- s ſuperior over the forfeiting perſon, longer than he thought d was actually diveſted in the forfeiting perſon's favour by a nder his own hand, though ſuch deed remained perſonal.

n ſuppoſing the forfeiting perſon's title or vaſſalage was, in of the clauſe in the act of parliament above recited, ſunk ie perſon of the reſpondent, and conſolidated with his pre- l right of ſuperiority, that could ſignify nothing; for ſtill rſonal right to the ſuperiority, and the power of ſurrendering tate into the hands of the Crown, which was in the forfeit- rſon, would remain entire and be forfeited to the Crown; ſo in virtue of that perſonal right, the appellants would be d to the eſtate, and could by law compel the reſpondent to di- mſelf of the eſtate in their favours, for the uſe of the public.

vas objected, that by the act every ſuperior is to have the as if reſigned into his hands *ad remanentiam*: and that if rfeiting perſon in this caſe had ſo reſigned into the reſpon- hands, ſuch reſignation would have given the reſpondent ght to the eſtate. But this is founded on a miſunderſtand- the clauſe: the act does not ſay that the ſuperior ſhall have me right as if the vaſſal had made a voluntary ſurrender *ad entiam* into his hands; but that the lands or tenements 1 of the ſubject ſuperior, ſhall recognoſce and return into nds of the ſuperior; and then it deſcribes the effects of eturn and recognoſcing, that it ſhall make the property be idated with the ſuperiority, as if the ſaid lands or tenements en reſigned *ad perpetuam remanentiam*. And the difference this, that if the vaſſal made a voluntary ſurrender, ſuch ſur- might by interpretation be conſtrued to be a conveyance or ciation of all right the vaſſal had to that ſubject, ſuppoſing have a title diſtinct from the right of vaſſalage derived from perior. But in virtue of this clauſe in the act of Parlia- the tenement being to recognoſce as holden of the ſuperior, re does return but the fee or right of vaſſalage: and if the had any ſeparate right diſtinct from it, that is not transferred ſuperior. And ſo in the preſent caſe, ſuppoſing the for- perſon's right of vaſſalage was ſunk into, and conſolidated he right of ſuperiority, yet his perſonal right or diſpoſition t very ſuperiority, would remain entire, forfeited by his n, and would draw along with it the full right to the eſtate.

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founded thereon: but this it is unneceſſary to detail, as it was admitted by his counſel at the bar, and found by the Houſe that the Court in fact had no juriſdiction thereon.

On the ſecond ground of the exceptions the reſpondent proceeds.)

The act founded on provides its benefits to all ſuperiors and vaſſals in the moſt extenſive words: and William Grierſon being vaſſal in the legal ſenſe of the word, it does not alter the caſe that William Grierſon had a power of changing his ſuperior and holding his lands of the crown: for ſince he choſe originally to hold them of the reſpondent, ſo long as he continued to hold them by that tenure, he was to all intents the reſpondent's vaſſal, and would by the law of Scotland have forfeited to him his life-rent eſcheat, &c.

It is true, that William Grierſon might in virtue of the procuratory of reſignation have made himſelf vaſſal to the crown, and it is equally true, that if he had been ſeiſed of the eſtate by no other title, this procuratory by his attainder being forfeited to the Crown, and by ſtatute now veſted in the appellants, would have empowered them to have made reſignation as is above mentioned, and would have entitled them to the eſtate. But then it muſt be obſerved, that William Grierſon was actually ſeiſed of the eſtate as vaſſal to the reſpondent; and that by the act "for encouraging all ſuperiors" &c. made anterior to the forfeiture, the king grants the eſtates of vaſſals attainted to their ſuperiors; and it enacts, that the property upon the vaſſal's attainder ſhall be conſolidated with the ſuperiority. This being the caſe, the very act which tranſmitted the procuratory of reſignation to the crown viz. the attainder of the vaſſal, did by force of the ſtatute "*for encouraging all ſuperiors*" &c. conſolidate the property with the ſuperiority, and of courſe barred the crown, and the appellants who claim under a grant from the crown, from aſſerting any right or intereſt in the procuratory of reſignation.

Journal, 3 March 1719-20.

It being referred to the judges to conſider whether the Court of Seſſion, had jurdiſdiction in this cauſe, they report, "that it appeared that the exceptant claimed by two rights: the one a "right expectant upon an eſtate tail in the perſon attainted to "ariſe upon the breach of a condition, whereof we conceive the "Lords of Seſſion had no juriſdiction; the other claim is as ſu-"perior, whereof we conceive the Lord of Seſſion had juriſdiction."

30 March 1720.

Counſel on both ſides agreeing with this opinion of the Judges, on the want of juriſdiction, and being heard on the merits as to the reſt of the cauſe, *It is reſolved and decreed, that the Lords of Seſſion had no juriſdiction to proceed and determine upon ſuch part of the ſaid exception as is above mentioned, and that their interlocutory ſentence or decree, ſo far as the ſame is founded thereupon, be therefore declared null and void: and it is ordered and adjudged, that as to the ſaid interlocutory ſentence or decree of the Lords of Seſſion, ſo far as the ſame is founded on that part of the exception whereby the reſpondent claims the ſaid eſtate as forfeited to him as ſuperior of his ſon William Grierſon, be reverſed: and it is further ordered, that the reſpondent be removed*

moved from all poſſeſſion of the eſtate in queſtion which he may have tained, and from the receipt of the rents and profits thereof; and that e ſaid commiſſioners and truſtees of the forfeited eſtates, take poſſeſſion id receive the rents and profits thereof, and proceed to execute the wers and authorities in them veſted with reſpect thereto.

For Appellants, *Ro. Dundas. Rob. Raymond.*
For Reſpondent. *Dun. Forbes. Will. Hamilton.*

ımes Farquhar of Gilmillſcroft, - - *Appellant;* Caſe 66.
he Right Hon. Hugh Earl of Loudoun, - *Reſpondent.*

5th *May* 1720.

Kirk Patrimony.—In 1631, certain vaſſals in church lands advanced money to the Crown, to aſſiſt in redeeming a wadſet grant-d to the Earl of Loudoun, the lord of erection, upon condition that they ſhould hold of the Crown as ſuperior, and have certain other privileges: in 1633, the ſuperiorities of all church lands were gratuitouſly annexed to the Crown; and about ſame time vaſſals who ſhould advance money for redeeming their feu duti.s were allowed by his majeſty to treat with the treaſury for that purpoſe, and to retain their feu duties in proportion to the ſums advanced. In a queſtion between the wadſetter and the vaſſals, who advanced money in 1631, it is found that they were not allowed to retain their feu duties, though they had paid money for privileges, the greateſt part of which had been granted to other vaſſals gratuitouſly.

UPON the Reformation in Scotland, the lands, teinds, and ſuperiorities belonging to monaſteries and other religious houſes, devolved to the Crown; and the greateſt part of them were ſoon after erected into temporal lordſhips, in favour of certain perſons called Lords of Erection. In 1608, the lordſhips of Keilſmuir and Barmuir, which were part of the eſtate which belonged to the abbacy of Melroſe, was given to Hugh then Lord Loudoun, the reſpondent's predeceſſor. King Charles the Firſt made a general revocation of all thoſe grants as prejudicial to the Crown, which occaſioning diſcontents, the lords of erection afterwards ſubſcribed a deed called *The General Surrender*, whereby they ſubmitted to his majeſty (under certain reſtrictions) their ſeveral intereſts by thoſe grants; upon which ſurrender the king's decrees arbitral proceeded, which were confirmed in parliament.

After this, in 1630, a contract was entered into between his then majeſty and John then Earl of Loudoun, whereby the ſaid earl agreed to reſign and ſurrender to the Crown the right he then had to the lands, ſuperiorities, &c. of the lordſhips of Keilſmuir and Barmuir, and certain juriſdictions, for which the Crown engaged to pay him 32,000 merks, being ten years's purchaſe; whereof 14,000 merks, in conſideration of the juriſdiction of heriffſhip, were actually paid, and his majeſty granted a wadſet

of the ſuperiorities and feu duties of the ſaid lordſhips to the earl, redeemable upon payment of the remaining 18,000 merks.

In 1631, George Reid and Robert Farquhar, the appellant's predeceſſor, two of the vaſſals, for themſelves and in name of the other vaſſals, entered into a contract with the Crown, whereby they agreed to pay to the treaſury 12,000 merks, to be applied towards the redemption of the Earl of Loudoun's wadſet, the other 6000 merks to be paid by the treaſury: and in conſideration of the ſaid 12,000 merks paid by the vaſſals his majeſty became engaged to grant them new charters of their lands to be holden of the Crown, to releaſe all claims that might ariſe from the breach of the conditions of their ſeveral infeftments, and to give them other advantages, *provided that they ſhould always be bound to pay their uſual feu duties to the Crown.*

Purſuant to this contract, John Earl of Loudoun, was afterwards, upon the 28th of September 1633, by order of the then treaſurer depute ſummoned to appear in St. Giles's Church, Edinburgh, at Martinmas then next, to receive his 18,000 merks. Before this term of Martinmas the king ſent down his letter, dated the 8th of October 1633, directed to the lords of the treaſury, and entered in the books of exchequer the 9th of November following, to this purpoſe, "That foraſmuch as divers of the "vaſſals of erection, as his majeſty was informed, were willing "to advance money, for buying their feu mails, to his majeſty's "uſe, they having retention in their hands of their feu mails "for ſuch years after the advancing of the money as in reaſon "and equity might compenſate the money to be advanced by "them, that his majeſty approved of that courſe, and it was there-"fore his pleaſure that public intimation ſhould be made to all "perſons having intereſt, to the effect that ſuch of the vaſſals "as were willing might come in and agree with the treaſurer "and his deputy for advancing the ſaid money, and get ſecurity "by act of the exchequer for retention of their feu mails, for "ſuch terms as ſhould be agreed upon." Prior to the date of this letter, the ſuperiorities of all church lands throughout Scotland had, by the act 1633, c. 14. been annexed to the Crown.

At Martinmas 1633, the 18,000 merks were tendered to the Earl of Loudoun in St. Giles's Church, but neither he, nor any perſon for him, having appeared to receive the money, it was conſigned in the hands of the dean of guild of the city of Edinburgh, for the earl's uſe, and an inſtrument taken thereupon. An action of declarator was alſo commenced againſt his lordſhip in the Court of Seſſion, by the officers of the Crown, to have it declared, that the ſaid wadſet was redeemed.

By a ſecond contract, in 1634, between the treaſury and the then Earl of Loudoun, it was agreed that upon payment of the 12 000 merks, being the ſum advanced by the vaſſals, the earl ſhould ſurrender his right of the ſuperiorities to the Crown, ſaving to himſelf his right to the feu duties until the other 6000 merks, for which the wadſet was redeemable, ſhould be paid. Accord-

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ingly ſuch ſurrender was made by the earl of Loudoun. By a charter granted by Queen Anne, in 1707, and infeftment thereon, the right of redemption of the wadſet was releaſed in favour of the reſpondent. And by an act of parliament 1707, c. 11. the power of redeeming kirk lands from the lords of erection was for ever renounced by the Crown. 1707, c 11.

The reſpondent's predeceſſors had all along continued to exact and receive from the vaſſals in the ſaid lordſhips the feu-mails, originally payable by them, till 1687, when the appellant ſtopped payment of his feu-duty, amounting to 34*l.* 9*s.* Scots annually. The appellant, in virtue of an aſſignment by the ſaid George Reid in favour of the appellant's predeceſſor, was become entitled to the whole benefit and advantage of the ſaid 12,000 merks, advanced by Farquhar and Reid, in terms of the contract with the treaſury in 1631, for redemption of the wadſet: and he contended that in virtue of the ſaid contract, and the king's letter in 1633, he was entitled to retain his feu-duties, until he was paid the ſaid 12,000 merks advanced to the Crown.

The reſpondent thereupon (after the date of his new charter in 1707) brought an action againſt the appellant, before the Court of Seſſion, for payment of the arrears of his feu-duties. The appellant appeared and made defences, and after ſundry proceedings the Lord Ordinary, on the 9th of July 1719, "Found that "the ſuperiorities, feu-duties, and other rents of the erected "lordſhip of Keilſmuir and Barmuir, being wadſet by King "Charles the Firſt to John Lord Loudoun for 18,000 merks in "the year 1630: and albeit by the ſubſequent contract 1631, "his majeſty ordained the ſaid wadſet to be redeemed, and the "feuars to furniſh 12,000 merks, and the treaſury 6000 merks, "for redemption thereof, it was agreed that after redemption "the feuars ſhould hold of his majeſty, and pay their feu-mails "and duties in their infeftments: and found, that the 12,000 "merks being paid to my Lord Loudoun, he did, in 1634, renounce the wadſet as to the ſuperiorities, and reſign the ſame "into his majeſty's hands, to the effect they might hold of the "Crown; but found that the ſaid Lord Loudoun was thereby "allowed to retain the wadſet right for the feu-mails and duties; "which wadſet and infeftment was ratified in parliament, 1633, "in his favour, till the wadſet ſhould be redeemed: and found "by the charter under the great ſeal, and infeftment thereon, in "favour of the reſpondent, in 1707, the reverſion of the wadſet "as to the feu-mails and duties is diſcharged, and the ſaid duties "of new diſponed to him; and repelled the defences founded on "the king's letter, in regard it was not alleged, that the appellant did make any agreement with the exchequer, by advancing of money and receiving a warrant for retaining their mails "in terms of the ſaid letter, the 12,000 merks being for getting "right to their ſuperiorities, and other advantages, in the terms "mentioned in the contract 1631."

The appellant reclaimed: but after anſwers for the reſpondent, the Court on the 28th of July 1719 "Found that the appellant

" had no right to retain his feu-mails and feu-duties, neither in " virtue of the contract 1631, nor of the king's letter 1633; and " adhered to the interlocutor of the Lord Ordinary." The appellant having reclaimed and petitioned the Court to receive a ſummons of reduction of the reſpondent's new charter, the Court on the 30th of the ſame July and 19th of Auguſt following, " refuſed " the deſire of his petitions." And by two ſubſequent interlocutors on the 21ſt of January and 17th of February 1720, the Court " Decerned the appellant to pay to the reſpondent all the arrears " of his feu-duties not only from the date of his new grant, but " likewiſe for all the preceding years ſince the year 1687."

Entered, 24 March 1719-20.

The appeal was brought from " ſeveral interlocutory ſentences " or decrees of the Lords of Seſſion of the 9th, 28th, and 30th " July, the 19th Auguſt, the 21ſt January, and 17th February " laſt (*a*)."

Heads of the Appellant's Argument.

Although there was nothing expreſsly ſtipulated in the contract for the retention of the money to be advanced by the vaſſals, yet the whole ſtrain of that contract ſhews the king's careſulneſs that the vaſſals ſhould have ſuitable reparation. And though, perhaps, the method for it was not then reſolved upon, yet it cannot be reaſonably ſuppoſed that thoſe, who advanced their money early, ſhould be worſe uſed than others, who came later to his majeſty's aſſiſtance. Nor could thoſe little conſiderations, of holding immediately of the Crown, inſtead of the Lords of Erection, or the diſpenſing with irritancies, or containing their rights in ſix ſignatures, be looked upon as any compenſation for their advancing ſo much money; ſince the advantage of holding of the Crown is given by act of parliament to all vaſſals of church-lands, as well as to thoſe who advanced their money; and the diſpenſing with irritancies could concern thoſe only who had irritancies in their charters, of whom perhaps there were few or none; and the comprehending their rights in ſix ſignatures, is calculated for ſmall vaſſals; for, thoſe that are more conſiderable, will not deſire ſuch a comprehenſion, but rather to have their own ſignatures by themſelves.

The king's letter did very well explain his intention towards the vaſſals, who ſhould advance money for the ſaid redemption; and though it did not come till two years after the contract, yet the money which the appellant's predeceſſor and the other vaſſals were thereby obliged to advance, was not ſo advanced till the day that the ſaid letter was recorded in the Exchequer.

Heads of the Reſpondent's Argument.

By the ſaid contract 1631, the appellant's predeceſſor and other vaſſals covenanted to pay that ſum of 12,000 merks, in order to have the privilege of holding their lands of the Crown, and for the other cauſes expreſſed in the contract itſelf, and never were to

(*a*) It appears from the Journals that the Earl of Loudoun was preſent in the Houſe when this appeal was entered; he *conſents* that the ſame ſhould be received, and to anſwer the ſame; and an order to receive, and to anſwer *forthwith*, is thereupon made.

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igly ſuch ſurrender was made by the earl of Loudoun. By a harter granted by Queen Anne, in 1707, and infeftment thereon, ie right of redemption of the wadſet was releaſed in favour of ie reſpondent. And by an act of parliament 1707, c. 11. the ower of redeeming kirk lands from the lords of erection was for ver renounced by the Crown. 1707, c. 11.

The reſpondent's predeceſſors had all along continued to exact nd receive from the vaſſals in the ſaid lordſhips the feu-mails, riginally payable by them, till 1687, when the appellant ſtopped ayment of his feu-duty, amounting to 34*l.* 9*s.* Scots annually. he appellant, in virtue of an aſſignment by the ſaid George eid in favour of the appellant's predeceſſor, was become entitled) the whole benefit and advantage of the ſaid 12,000 merks, ad-anced by Farquhar and Reid, in terms of the contract with the reaſury in 1631, for redemption of the wadſet: and he contended iat in virtue of the ſaid contract, and the king's letter in 1633, e was entitled to retain his feu-duties, until he was paid the ſaid 2,000 merks advanced to the Crown.

The reſpondent thereupon (after the date of his new charter 1707) brought an action againſt the appellant, before the Court f Seſſion, for payment of the arrears of his feu-duties. The ap-ellant appeared and made defences, and after ſundry proceed-ngs the Lord Ordinary, on the 9th of July 1719, "Found that 'the ſuperiorities, feu-duties, and other rents of the erected 'lordſhip of Keilſmuir and Barmuir, being wadſet by King 'Charles the Firſt to John Lord Loudoun for 18,000 merks in 'the year 1630: and albeit by the ſubſequent contract 1631, 'his majeſty ordained the ſaid wadſet to be redeemed, and the 'feuars to furniſh 12,000 merks, and the treaſury 6000 merks, 'for redemption thereof, it was agreed that after redemption 'the feuars ſhould hold of his majeſty, and pay their feu-mails 'and duties in their infeftments: and found, that the 12,000 'merks being paid to my Lord Loudoun, he did, in 1634, re-'nounce the wadſet as to the ſuperiorities, and reſign the ſame 'into his majeſty's hands, to the effect they might hold of the 'Crown; but found that the ſaid Lord Loudoun was thereby 'allowed to retain the wadſet right for the feu-mails and duties; 'which wadſet and infeftment was ratified in parliament, 1633, 'in his favour, till the wadſet ſhould be redeemed: and found 'by the charter under the great ſeal, and infeftment thereon, in 'favour of the reſpondent, in 1707, the reverſion of the wadſet 'as to the feu-mails and duties is diſcharged, and the ſaid duties "of new diſponed to him; and repelled the defences founded on "the king's letter, in regard it was not alleged, that the appel-"lant did make any agreement with the exchequer, by advan-"cing of money and receiving a warrant for retaining their mails "in terms of the ſaid letter, the 12,000 merks being for getting "right to their ſuperiorities, and other advantages, in the terms "mentioned in the contract 1631."

The appellant reclaimed: but after anſwers for the reſpondent, the Court on the 28th of July 1719 "Found that the appellant

to one of his majeſty's juſtices of the peace, on or before the laſt day of June 1716, then he ſhould from and after the 13th of November 1715, ſtand and be adjudged attainted of high treaſon, to all intents and purpoſes whatſoever, and ſhould ſuffer and forfeit as a perſon attainted of high treaſon, by the laws of the land, ought to ſuffer and forfeit. And by the ſaid act, "Every of the ſaid juſtices of "the peace is thereby required to commit every of them," the ſaid Sir Donald Macdonald and others ſo ſurrendering himſelf to priſon for the ſaid high treaſon, there to remain till he ſhould be diſcharged by due courſe of law, and thereof immediately to give notice to one of his majeſty's principal ſecretaries of ſtate.

This act received the royal aſſent on the 7th of May 1716. Previous to that date, on the 20th of April 1716, Sir Donald Macdonald wrote a letter to General Cadogan, then commander in chief in Scotland, dated from the iſland of Uiſt, of the following tenor. "Sir, underſtanding you were coming to Inverlochy "I thought I was bound (to ſave you more trouble) to acquaint you "by theſe, that I have ordered my friends and men in the iſle of "Sky, to go with their full arms, and deliver them to any having "your orders. In the ſame manner I'll ſend over, as ſoon as poſ- "ſible, all the arms that are in this barony, and without any delay "will do myſelf the honor to wait on you at Inverlochy; but my "ſtate of health being ſo very bad of a long time, and my infirm- "ity continuing, I entreat the favour to be allowed to go by ſea "to Inverlochy; which having once your allowance, I promiſe "upon honour to do without any loſs of time. Thus expecting "a favourable anſwer and paſſports, I am, &c. Donald Mac- "donald." And Sir Donald wrote a ſecond letter to General Cadogan, on the 25th of April to the like purport. General Cadogan ſent Sir Donald an anſwer dated the 29th of April, conſenting to his requeſt of coming to Inverlochy by ſea. Sir Donald however never came to Inverlochy, nor ſurrendered himſelf to a juſtice of the peace, but died in the iſle of Sky, on the 1ſt of March 1718.

The appellants ſeized and ſurveyed the eſtate of Sir Donald Macdonald as veſted in them by virtue of ſeveral acts of parliament reſpecting the eſtates of perſons attainted, and Donald Macdonald, the ſon of the ſaid Sir Donald, in terms of the act 5 G. 1. c. 22. "for enlarging the time to determine claims on the "forfeited eſtates" preſented his exceptions to the Court of Seſſion againſt the ſeizure and ſurvey made by the appellants. He inſiſted that Sir Donald having ſurrendered himſelf within the time preſcribed by the act of attainder, the ſaid eſtate was not forfeited; and he inſiſted further that Sir Donald was only an heir of entail under ſtrict irritant and prohibitory clauſes, and if he had forfeited could only forfeit during his life (a). The appellants having given in anſwers, the ſaid Donald Macdonald craved leave to repeat a proof taken in an action at the inſtance of the Laird of

(a) This is no where elſe mentioned or inſiſted on in either of the appeal caſes. It afterwards received determination in the well-known caſe of *Gordon of Park*.

M'Leod,

M'Leod, againſt him in relation to the appropriation of a miniſter's ſtipend, in which the appellants were parties, to ſhew that Sir Donald had been incapable of ſurrendering himſelf to a juſtice of the peace, from the ſtate of his health and otherwiſe. The queſtion had been, in that action with the Laird of Macleod, whether Sir Donald Macdonald had been attainted or not; and ſeveral witneſſes had been examined thereon. The appellants inſiſted, that the then exceptant could not have the benefit of the depoſitions made in the other cauſe, but that he ought to prove his exceptions in the ordinary way, that the appellants might have an opportunity to croſs-examine the witneſſes. The exceptant pleaded, that the proof in the former action ought to be admitted, for though there were other parties, yet the appellants were likewiſe parties, and the only parties who had any real intereſt: that the proof was taken by one of the Judges in preſence of the appellants' counſel, the witneſſes were croſs examined and the caſe fully debated by them: and that as the judges were limited to determine all exceptions in ſo ſhort a time, it might be impracticable, conſidering the diſtance of the place where the witneſſes lived, to have them re-examined; and they were people of ſuch character as took off any preſumption, that they would ſwear contrary to what they had ſworn formerly.

The Court on the 21ſt of Auguſt 1719, "allowed the appellants to prove the facts ſet forth in their anſwers and condeſcendance, and found that the exceptant might repeat in this proceſs the probation already adduced by him in the proceſs between the Laird of Macleod and him, wherein the appellants did compear, and allowed him to adduce what further probation he ſhould think proper for clearing or fortifying the ſeveral allegeances." On the 2d of September 1719, the Court granted a commiſſion to the appellants to examine witneſſes in England. And on the 28th of October 1719, the Court "found it proven that the deceaſed Sir Donald Macdonald, did ſurrender himſelf to the General Cadogan commander in chief by a miſſive letter dated the 25th day of April 1716, and that General Cadogan did accept of his ſurrender, and ordained him to go to the garriſon of Inverlochy, and gave directions for the officers commanding there to receive him, which the general notified to the Lord Townſhend, then ſecretary of ſtate; and found it proven, that the ſaid deceaſed Sir Donald Macdonald, was, by reaſon of indiſpoſition, in no capacity to travel, without the hazard of his life, to deliver himſelf perſonally; and found it proven that he made ſeveral attempts to go to Inverlochy, but was not able to make out the voyage by reaſon of his indiſpoſition, and that he continued under that incapacity of travelling to Inverlochy, till the 30th day of June 1716, and thereafter till his death; and found that ſeveral certificates of the continuance of his indiſpoſition were from time to time ſent to the governor of Inverlochy, and others in the government, and that the verity of the ſame is depoſed upon by the grantors: and found and declared, that the ſaid deceaſed Sir Donald Macdonald did

" not fly to avoid his being apprehended and profecuted accord-
" ing to law: and in regard the act of attainder *primo Georgii*
" againſt the ſaid Sir Donald Macdonald and the other perſons
" therein named, doth only attaint ſuch of them as ſhould not ren-
" der themſelves on, or before the laſt day of June 1716, found and
" declared, that the deceaſed Sir Donald Macdonald, having
" ſurrendered himſelf as above, was not attainted by the ſaid act,
" and that the publick has no right to his eſtate and therefore
" ſuſtained the exception."

Entered, 21 Dec. 1719.

The appeal was brought from " ſeveral interlocutory ſentences
" or decrees of the Lords of Seſſion of the 21ſt of Auguſt, the
" 2d of September, and 28th of October, 1719."

Donald Macdonald, ſon of Sir Donald, was firſt called as a party, but he dying the appeal was revived againſt Sir James Macdonald his uncle.

Heads of the Appellants' Argument.

The words of the act of parliament are plain, that if Sir Donald Macdonald and others therein particularly named, ſhould not render themſelves to one of his majeſty's juſtices of the peace, on or before the day, therein mentioned for that purpoſe, they ſhould ſtand attainted of high treaſon. The act therefore did require a rendering of Sir Donald's perſon to a juſtice of the peace, which he never did; and a ſubmitting by letter to the commander in chief could never be called a rendering of his perſon. Even this pretended ſubmiſſion by a letter was before the act of parliament; and ſo was not a rendering of Sir Donald's perſon in obedience to that act.

Suppoſing it were true, that Sir Donald's indiſpoſition was ſuch as made him unable to take a journey in order to render his perſon to a juſtice of the peace; yet no judges of the law were empowered by any decree of theirs to ſupply the law, or rather alter it, by adjudging that Sir Donald's indiſpoſition and inability to travel muſt ſtop the act of attainder from having its effect; or where the law required one thing to be done, could adjudge that the doing of another thing was equipollent.

Sir Donald was under the ſame indiſpoſition when he was at Perth with the rebels, and was carried from Perth in a litter. A proof was attempted of Sir Donald's inability from indiſpoſition to comply with the act; but yet he was able to travel to the iſles to avoid his being ſeized, and might with much more eaſe have been tranſported ſome miles to have rendered his perſon, had he inclined to do it. When Colonel Cholmondely, and other officers of the army, were ſent with troops into the iſles to diſarm the rebels, and were on the ſame iſland where Sir Donald was, he did not think fit to be ſeen by them. After the letter written to General Cadogan, he travelled through the iſlands of Uiſt and Sky, and inſtead of going to Inverlochy, went from Uiſt to Bernera and Dunholm, which are not in the way to Inverlochy, but rather the direct contrary.

Heads

Heads of the Reſpondent's Argument.

The reaſon of the act of attainder in the preſent caſe, and of all other ſimilar acts, is to bring offenders to juſtice; and that by their flying and keeping out of the way, they might not avoid the puniſhment due to their crimes. Thus the recital of the act in queſtion takes notice, that the perſons therein named *had fled to avoid their being apprehended and proſecuted according to law for their offence of high treaſon.* This certainly can never be applied to the caſe in queſtion, where the perſon ſuppoſed to fly from juſtice, and for that reaſon to be attainted, was ſo far from doing ſo, that he actually ſurrendered himſelf to the then commanding officer of the forces to whom, and to other officers under him, he from time to time gave an account where he was, having delivered up all his arms, and done every thing in his power to teſtify his ſubmiſſion to the government. The country was then entirely under the power of his majeſty's troops; and had the commanding officer thought fit, or imagined this ſurrender not ſufficient, he might have put him under actual cuſtody, and the government might have brought him to trial when they pleaſed.

Sir Donald's caſe was ſtill the more favourable, that he had made the ſurrender to the general, before he could know the particular directions of the act of attainder, nay, before it paſſed into a law: and as he was then the general's priſoner, he became diſabled, though his health had been good, to ſurrender himſelf to another. Beſides, there having been no juſtice of peace within 200 miles of him, had he attempted a journey to ſurrender to ſuch juſtice at that diſtance, he might have been taken up and deprived of any benefit of his ſurrender, which had been accepted by the general, and in which he had reaſon to think himſelf ſecure. The naming of a juſtice of peace in the act to whom perſons might ſurrender themſelves, was certainly calculated as a favour or eaſe to the perſons intending to ſurrender: for nobody can doubt that the commanding officer was as proper as a juſtice of peace; and General Cadogan himſelf was a juſtice of the [redacted]e.

Sir Donald never concealed himſelf from the offi ers of the army, as was alleged. On the contrary, they knew from time to time where he was. Colonel Cholmondely, who was in that country, knew where he was, had meſſages from him, knew of his ſurrender to General Cadogan, and therefore never went to take him; and he likewiſe at that time knew of his bad health.

The ſeveral places Sir Donald went to were directly in his way to Inverlochy; nor could he have gone any other way with ſafety. It was alſo proper for him to take the way he did, conſidering the ſtate of his health, that if he grew worſe, as he did, he might meet with ſome tolerable accommodation: but he could have had none had he gone the other way, and the method he took was the uſual way of travelling in that country.

Judgment, 11 May 1720.

After hearing counſel, *It is ordered and adjudged, that the ſeveral interlocutory ſentences or decrees complained of in the ſaid appeal be reverſed: and it is further ordered, that the reſpondent be removed from all poſſeſſion of the eſtate in queſtion, which he may have obtained (if he have obtained any) by virtue or colour of the ſaid decree, and from the receipt of the rents and profits thereof; and that the commiſſioners and truſtees for the forfeited eſtates take poſſeſſion and receive the rents and profits thereof, and proceed to execute the powers and authorities in them veſted with reſpect thereto, any right, title, or claim of the reſpondent notwithſtanding.*

For Appellants, *Ro. Dundas. Tho. Bootle.*
For Reſpondent, *Dun. Forbes. C. Talbot. Will. Hamilton.*

By the act 6 Geo. 1. c. 24. the king was enabled to grant the ſame proviſions to the widow and daughters of Sir Donald Macdonald, as they would have had if he had not been attainted.

Caſe 68. Alexander Lord Saltoun, - - - *Appellant*;
William Fraſer Eſq; his Brother, Guardian and Truſtee for Alexander Fraſer, the Appellant's eldeſt Son, - - - *Reſpondent*.

16th *May* 1720.

Parent and Child.—Tutor and Pupil.—Lord Saltoun having left 4000*l.* payable at the firſt term after his deceaſe, to the eldeſt ſon of the maſter of Saltoun, and failing him to the grantor's heirs of entail: and having appointed an uncle of the pupil to be his tutor and curator with a ſalary during nonage, with power to uplift the principal and intereſt, to employ the money in the purchaſe of lands, &c.: the pupil's father, the heir and executor of the grantor of the proviſion, was not obliged to pay over the money to the uncle without ſecurity, but to pay it to the Court of Seſſion, who were ordered to lay it out in the manner directed by the grant.

WILLIAM Lord Saltoun deceaſed, father of the appellant and reſpondent, ſettled his real eſtate, by way of entail on the appellant and the heirs male of his body, whom failing, to certain other heirs of entail therein mentioned. Having alſo a conſiderable perſonal eſtate, he executed bonds of proviſion in favour of his younger children, which he deſigned ſhould be paid out of the perſonal eſtate.

On the 17th of May 1714, the late Lord Saltoun executed a bond for the ſum of 4000*l.* ſterling to Alexander Fraſer his grandſon, the appellant's eldeſt ſon, then and ſtill under age, and the heirs male of his body; whom failing, to the appellant's ſecond and third ſons, and the heirs male of their bodies; whom failing, to any other heir male of the appellant's body; whom failing, to the

the reſpondent and the heirs male of his body; whom failing, to James Fraſer, the reſpondent's younger brother, and the heirs male of his body; whom failing, to return to the appellant's family. The grantor declared that the ſum ſhould be payable at the firſt term of Whitſunday or Martinmas after his death, but ſhould be no charge upon his landed eſtate; and he recited the cauſe of it to be, "That his grandchild after his coming at age "might have an eſtate of his own, and not be a burden to his "father." Then follow theſe words, "Therefore I hereby "will and declare, that it is my earneſt deſire, that the ſaid 4000*l.* "may, as ſoon as it can, be employed for the buying the lands of "Cairnbuilg, if the ſame can be got, with a ſufficient ſecurity "purchaſed therefore; which failing in the purchaſe of any "other well-holden and well-accommodated barony of land that "can be got for the ſaid ſum; and when the ſame is purchaſed, "that the lands may be bought in the name and for the behoof "of the ſaid Alexander Fraſer, my grandchild, and the heirs "male of his body; which failing, to the other heirs male and "of tailzie according to this obligement, and the whole clauſes "above and hereinaſter contained." Then he nominates and appoints the reſpondent to be tutor and curator to the ſaid Alexander Fraſer, the appellant's ſon, during his pupillarity and minority, relative to the ſaid bond, with power to him for the purpoſes therein recited to call for the ſaid ſum when he ſhould think fit, and to intromet with the whole intereſt thereof, until the ſaid Alexander Fraſer ſhould be of age, and to employ the ſaid money upon ſecurity, or in purchaſing lands as formerly recommended: and the reſpondent was to have allowance of his expences, and 500 merks for his own pains yearly; with a proviſo, that he ſhould not be chargeable for any omiſſions, but only for his actual intromiſſions with any part of the ſaid ſum and intereſt, or rents and profits of the lands ſo to be purchaſed.

On the 15th of November 1714 the late Lord Saltoun, having made up a liſt or inventory of bonds owing to him, did by dockets ſubjoined thereto direct certain bonds to be appropriated and applied for payment of the younger children's proviſions, and that others ſhould belong to Alexander Fraſer his grandchild, and be delivered to the truſtee for his behoof to be applied for payment of the ſaid bond for 4000*l.*; but this notification did not amount to an aſſignment, and the liſt or ſchedule was ſcored and blotted in ſeveral places. The late Lord Saltoun died upon the 18th of March 1715.

About three years after his death, the reſpondent brought an action againſt the appellant before the Court of Seſſion, inſiſting that he ſhould be decerned to make payment to the reſpondent, for the uſe of the ſaid Alexander Fraſer, of the ſaid ſum of 4000*l.* with intereſt from the Whitſunday after the late lord's deceaſe; or otherwiſe to make over by aſſignment to the reſpondent, for the ſame uſe, the ſeveral bonds which the Lord Saltoun by the ſchedule of the debts owing to him had declared ſhould belong to the ſaid Alexander Fraſer his grandchild, and be delivered to the truſtee

truſtee for his behoof, towards the payment of the 4000*l.* To this action the appellant made defences, and the Lord Ordinary on the 27th of November 1719 "Decerned the appellant to make "payment and ſatisfaction to the reſpondent as tutor and admi- "niſtrator, for the uſe and behoof of the ſaid Alexander, maſter "of Saltoun, his pupil, of the ſum of 4000*l.* ſterling principal, and "haill annual rents thereof, reſting ſince the term of Whitſunday "1715, and of the ſame annual-rents in time coming, during the "not payment thereof; or at leaſt to make payment of the afore- "ſaid annual-rents paſt reſting and in time coming; and in ſecu- "rity of the ſaid principal ſum, to aſſign him the bonds men- "tioned and contained in the inventory libelled on after the form "and tenor thereof." To this interlocutor the Lord Ordinary adhered upon the 10th of December thereafter.

The appellant preſented a reclaiming petition, to which the reſpondent made anſwers, and the Court on the 23d of the ſaid month of December unanimouſly "refuſed the deſire of the ſaid "petition, and adhered to the Lord Ordinary's interlocutor." The appellant having preſented a ſecond reclaiming petition, the Court without anſwer on the 30th of the ſame month "refuſed "the deſire of the ſaid petition, and adhered to their former in- "terlocutors without prejudice to the appellant to complain in "caſe of the reſpondent's mal-adminiſtration."

Entered, 23 Jan. 1719-20.

The appeal was brought from "a decree of the Lords of "Seſſion of the 27th of November, and of ſeveral interlocutory "ſentences or decrees of the ſaid Lords of the 10th, 23d, and "30th of December 1719."

Heads of the Appellant's Argument.

The appellant could not pay the whole ſum contained in the bond and intereſt, ſince he had purchaſed a part of the lands of Cairnbuilg, and ſome other lands adjacent thereto, for about twenty-one years purchaſe, agreeably to the will of his father, who very well knew what the advantage of purchaſing theſe lands would be to his eſtate, by their having moſs and muir inexhauſtible, whereas both the moſs and muir, which belonged to him, would in a few years be exhauſted, and he and his tenants want fuel. And the appellant was, and is content to convey theſe lands to his ſon, which are in value above 3000*l.* ſterling: but what the reſpondent wants is to have the money at his diſpoſal without regard to the intereſt of the family.

If the reſpondent would purchaſe lands which were then to be ſold lying near to the appellant's eſtate, he was, and is ready to pay to him the remainder of the principal ſum and intereſt, upon his finding ſurety to apply the money for that end, or ſettling it ſo, as that it ſhould be forthcoming to the minor.

If the purchaſe of the lands of Cairnbuilg ſhould upon examination be judged not agreeable to the ends and purpoſes of the deed, the appellant was willing to bring the money into court, to be by the direction thereof ſettled for the uſe of the minor, ſo as the reſpondent ſhould not have it abſolutely in his power to miſapply the

the principal ſum, leaving the annual intereſt thereof to his management.

Though the late Lord Saltoun, at the time he executed the ſaid deed, had bonds lying by him to the value of the ſum contained therein, yet he did not think fit to convey thoſe to the reſpondent for the uſe of his grandchild. He gave him the *jus exigendi* from none but the appellant, knowing that *he* had a greater concern that the deſcendants of his own body might have a plentiful eſtate, than it could be expected their uncle would have, and would take care that the money might be applied according to the will and earneſt deſire of his father.

Although any perſon ſhould paſs by a father, and name an adminiſtrator to a ſum of money that he gifts to a child, yet ſuch adminiſtrator by the law of Scotland, having no government of the child's perſon, is only manager or adminiſtrator of that ſum, which is in effect as a ſteward for the child while he is under age. This is the caſe of the reſpondent; he has a ſalary allowed him for his pains, a thing inconſiſtent with the gratuitous office of tutor and curator, and which conſequently gives the appellant a juſt title to enquire into his management.

The reſpondent alleged, that the late Lord Saltoun intended certain bonds for payment of the ſaid ſum; but that does not alter the caſe; for there is no doubt but he intended, that the debts due to him ſhould be applied for payment of the ſaid 4000*l.*; but he did not think fit to convey theſe bonds to the reſpondent for the uſe of his grandſon, leaving that to be done by the appellant as a check upon the reſpondent. The liſt of theſe bonds is ſo much ſcored and blotted, that it cannot be looked upon as a deed.

Although the appellant did purchaſe the lands of Cairnbuilg, and other adjacent lands adjoining to it, without conſent of the reſpondent, (which he could not get at the time,) yet they ought to be accepted as ſo much of the 4000l. ſince his father expreſsly ordered them to be purchaſed with part of that money; and the appellant could not acquaint the reſpondent at the time he purchaſed the ſame, becauſe the reſpondent was then out of the kingdom, and the lands being expoſed to ſale, the appellant muſt have loſt the purchaſe if he delayed it. Whether the reſpondent have the *jus exigendi* is not ſo much diſputed, but the ſingle queſtion is, whether the appellant's natural right of adminiſtration, does not entitle him to inſpect the management of a young man, poſſeſſed of no viſible eſtate, endeavouring to take 4000*l.* out of lands where it is well ſecured for the appellant's children, without giving any account how he is to diſpoſe of it, or ſecurity that he ſhall not miſapply it.

Heads of the Reſpondent's Argument.

It is evident from the whole deed, that the Lord Saltoun intended to exclude the appellant from all pretenſions to the management of the premiſes; and it was, no doubt, for good reaſons, that he ſettled this part of his perſonal eſtate directly to his grandchild;

no relief.

The reſpondent who is named adminiſtrator in truſt, ample and diſcretionary power, is better judge of the ſecu the appellant who ſtands debtor, and he muſt in conſequ the truſt repoſed in him, ſecure it according to the beſt judgment. It can import nothing, whether the reſponde viſible eſtate of his own or not; the late Lord Saltoun confidence in him as truſtee, and knew very well what had; yet in fact he has a proviſion of two thouſand pou upwards, which it is hoped will be more than ſufficient up any loſs by default of management, if any ſuch ſhall which there is no ground to ſuſpect. In the caſe of the nagement of a guardian or truſtee, the law has direct remedies, and the appellant may complain, if any ſuch thi pen; but he cannot, under colour of demanding ſecuriti the truſtee, retain the minor's money in his own hands, bar the truſtee from entering upon his office.

The lands offered by the appellant are held by a v tenure, and with a very inſecure title, and bought at an ex price; ſo that the truſtee could not be anſwerable to make purchaſe for the minor. Nor is it adviſeable for the minor, the lands conveyed to him from the appellant, ſeeing by t of Scotland, it might bring him in danger of being made li the appellant's debts.

Judgment, 16 May 1720.

After hearing counſel, *It is ordered and adjudged that decree, and the ſeveral interlocutory ſentences or decrees affirm ſame, complained of in the ſaid appeal, be reverſed; and it is ordered and adjudged that the appellant forthwith bring be Lords of Seſſion, to be depoſited with their proper officer, the 40 queſtion, with the intereſt due to the time of bringing it in money, ſecurities to be approved by the Court, the principal ſum to be with the approbation of the ſaid Lords of Seſſion, in as ſoon as conv may be, in the purchaſe of lands, according to the intention of the*

Lords of Seſſion, his title to the lands in Cairnbuilg by him purchaſed, and the value thereof; and in caſe the Lords of Seſſion ſhall approve of his title thereto, or to any part thereof, the appellant ſhall convey the ſame or ſuch part thereof, according to the intention of the ſaid bond of the late Lord Saltoun: And ſo much as the Lords of Seſſion ſhall find the lands ſo by the appellant conveyed to be really worth, not exceeding the price paid by the appellant for the ſame, they ſhall cauſe to be paid back to the ſaid appellant out of the ſaid 4000l. *ſo ſoon as ſuch value is aſcertained and conveyance made: and thoſe lands ſo conveyed ſhall be eſteemed part of the purchaſe directed to be made with the ſaid* 4000l., *as aforeſaid: And it is further ordered, that the appellant and the reſpondent William Fraſer, may each of them have liberty to propoſe to the Lords of Seſſion, from time to time, ſecurities or purchaſes for the ſaid money.*

For Appellants, *Rob. Raymond. Sam. Mead. Dun. Forbes.*
For Reſpondents, *Rob. Dundas. Tho. Lutwyche. Tho. Kennedy.*

Thomas Fairholm of Piltoun, - - *Appellant*; Caſe 69.
Sir William Cockburn, and Sir George Hamilton, Baronet, - - - *Reſpondents.*

21ſt *May* 1720.

Mutual Contract.—Perſonal and real.—A creditor by adjudication, with an unexpired legal and without infeftment, enters into an agreement with two other creditors, by which he conſents that they ſhall be paid before him; in a competition between a ſingular ſucceſſor of the adjudger with notice, and the repreſentatives of thoſe two creditors, it is found that the preference in the contract was perpetual, and that as it concerned a perſonal ſubject on which no infeftment had followed, it was effectual againſt the ſingular ſucceſſors of the contractors.

Fraud.—A creditor purſuing a judicial ſale, enters into a contract before the ſale to ſell to a third party at a certain ſum: he afterwards, at the ſale, purchaſes for a ſmaller ſum, but is obliged to account for the larger ſum, which had been paid to him on terms of the prior contract.

Bona fides.—A purchaſer at a judicial ſale having paid a debt *bona fide* to creditors ranked before him; in accounting to creditors who were prior to both, has allowance of ſuch *bona fide* payment; but action of repetition is reſerved to the prior creditors.

Coſts.—6 *l.* coſts given againſt the appellant.

IN 1682, James Riddell was poſſeſſed of the eſtate of Kingſaſs; but was indebted to ſeveral perſons in various ſums of money. To Sir James Cockburn, and Sir Robert Mill, under whom the reſpondents claim, he owed a debt of 8443*l.* Scots; and Sir James and Sir Robert had uſed inhibition againſt their debtor, and he having forfeited his ſingle and life-rent eſcheat to the Crown, the ſame was granted to them. To Walter Riddell, his brother, he owed another debt of 42,624 merks Scots, for which Walter Riddell had obtained a decree of adjudication in 1681; no infeftment had been obtained by Walter Riddell.

The creditors afterwards came to an agreement among themſelves and with their common debtors, and one Dr. Livingſton agreed to become tenant of the premiſes at a certain rent, and purchaſer upon certain conditions if upon trial he was pleaſed with the bargain during the currency of the tack. Of ſame date two deeds were executed; the one a tack, whereby the debtor, James Riddell, with conſent of his creditors, let to the ſaid Dr. Livingſton the eſtate of Kinglaſs for the term of ſeven years, at the rent of 2760 merks Scots yearly, payable to the creditors; of which rent Sir James Cockburn and Sir Robert Mill were annually to receive a greater portion than anſwered to the intereſt of their money: the other a contract, whereby James Riddell and his creditors are obliged to convey the eſtate to Dr. Livingſton for the price of 46,000 merks Scots, if he at any time during the currency of the tack intimated his willingneſs to purchaſe: by this contract it was agreed, "upon the whole matter, and as to "the perſons to whom the ſaid price ſhall be paid, in caſe of in-"timation as ſaid is; and that the ſaid bargain be conſummated "in manner aforeſaid," that Sir James Cockburn and Sir Robert Mill ſhould be paid the whole ſums due to them, in the firſt place; it was further agreed, that in caſe Dr. Livingſton ſhould not hold the bargain, but that the ſame, after the expiration of the ſaid leaſe, ſhould be given to another, or that the ſaid James Riddell could have a purchaſer for certain lands and intereſts that he poſſeſſed in Leith, the ſaid Sir James and Sir Robert were ſtill to be paid what was due to them, out of either of the intereſts that ſhould be firſt diſpoſed of; and it was alſo further agreed, that Sir James Cockburn and Sir Robert Mill ſhould adjudge the eſtate for their debts, and the ſaid Walter Riddell agreed never to object to them, that the ſaid adjudication was not within year and day of his own, but allowed them to have their payment of their juſt debts, as then ſtated and agreed to, and preſerve therein the way and manner above preſcribed. On the other hand, Sir James and Sir Robert agreed that their diligence ſhould not militate againſt the ſaid Walter, or his right, ſo as to debar him, but that both parties ſhould take their ſatisfaction in the way and manner, and according to the diviſion ſpecified in the ſaid leaſe and contract; and all the creditors were mutually bound to communicate and make forthcoming their debts and titles to each other, for the ends of this contract, and to defend againſt all others.

Dr. Livingſton was, in virtue of the leaſe, put in poſſeſſion of the eſtate; but he dying ſoon after, the intended bargain for the ſale of the lands took no effect: however the doctor whilſt he lived, and his executors during the remaining term of his leaſe, poſſeſſed the lands and paid the rents to the creditors. The intended ſale of the lands being thus diſappointed, Sir James Cockburn and Sir Robert Miln did not take adjudications on their debts.

Walter Riddell conveyed his adjudication to his four daughters, and he, or they, entered to poſſeſſion of the premiſes. In May 1690, theſe daughters conveyed the adjudication and all their right

ght to the premiſes to William Kintore; and in the conveyance
him they mentioned the ſaid agreement among the creditors of
ames Riddell, which in the clauſe of warrandice is thus ex-
epted: "Excepting always forth and from this preſent warran-
dice the contract above mentioned, and all clauſes therein
contained, whereby the ſaid Walter Riddell ſtands any man-
ner of way obliged, with this expreſs proviſo and condition,
that this exception ſhall import no homologation by Mr. Kin-
tore of the ſaid contract, we, our heirs and ſucceſſors, being
always free as to any warrandice or performance of the ſame,
and whereof the ſaid Mr. William Kintore by acceptation here-
of is to free and relieve us: and with the obligement of which
relief this preſent right is hereby declared to be expreſsly
affected."

In May 1700, Kintore conveyed his right to the premiſes, alſo
ith notice of the ſaid contract, to George Clark, one of the bail-
ies of Edinburgh; and Clark granted a back bond, that the con-
eyance to him was redeemable upon payment of 2666*l.* 13*s.* 4*d.*
This bond Kintore conveyed to Dr. Scott, Dean of Hamilton.

In 1702 Dr. Scott, intending to redeem that right which was
n the perſon of Clark, paid him up 1000*l.* ſterling, and made an
greement that Clark ſhould retain the right, as a ſecurity for the
emainder of the ſum, being 1666*l.* 13*s.* 4*d.*: and accordingly
eorge Clark reconveyed to Dr. Scott the rights to the adjudica-
ion and lands of Kinglaſs, reſerving to himſelf theſe rights as a
ecurity for the ſum ſtill remaining due to him.

In 1705, Thomas Fairholm, the appellant, being creditor to
eorge Clark, obtained from him for ſecurity and ſatisfaction of
is debt a diſpoſition of that reſerved intereſt which George Clark
ad in the adjudication which affected the lands of Kinglaſs; and
pon this diſpoſition was infeft. The appellant, who thus had
equired right to the adjudication affecting the eſtate of Kinglaſs
the extent of 1666*l.* 13*s.* 4*d.*, was oppoſed in his poſſeſſion by
e creditors of Dr. Scott, who had become bankrupt, and he
rought an action of ranking and ſale againſt them before the
ourt of Seſſion. In the ranking he was preferred by the Court
theſe creditors of Dr. Scott, who were the only parties, in a
im exceeding the value of the eſtate. After the uſual ſteps of
roceeding, the eſtate was brought to a judicial ſale, and pur-
haſed by the appellant at a price of 1092*l.* 5*s.* 11*d.* ſterling,
eing 18 years' purchaſe of a rental which had been previouſly
roved.

Soon afterwards the appellant was ſued by the executors of Sir
amuel M'Clellan, who had received from the ſaid George Clark
ome right to the premiſes prior and preferable to that from Clark
o the appellant; and, after ſome litigation, the Court ordained
he appellant to pay to theſe executors a ſum of 10,000*l.* Scots,
hich he paid accordingly.

Prior to the judicial ſale of the premiſes, the appellant entered
nto an agreement with an agent of the Ducheſs of Hamilton,
hat he ſhould purchaſe the ſaid lands at ſuch ſale, and afterwards
convey

convey the ſame to the ducheſs for 44,000 merks Scots (2555*l.* 11*s.* 1*d.* ſterling); and accordingly, a few months after the ſale the ducheſs paid him this ſum as the price thereof.

In 1719, the reſpondents, who had obtained rights to the debts which ſtood in the perſons of Sir James Cockburn and Sir Robert Mill, brought their action againſt the appellant before the Court of Seſſion for payment to them of the ſaid ſum of 8443*l.* Scots, with intereſt from 1682, upon this ground, that by the contract before mentioned between James Riddell and his creditors on the one part, and Dr. Livingſton on the other, it was agreed that the debts due to Sir James Cockburn and Sir Robert Mill ſhould be paid out of the price of the lands preferably to the debt due to Walter Riddell; and theſe lands having now been ſold, and the price having been recovered by the appellant in virtue of Walter Riddell's adjudication, he ought to make that ſum forthcoming to the reſpondents; and they ſtated that the appellant had had ſufficient notice of the ſaid contract, not only by the recital of it in the ſeveral intermediate conveyances to him, but the ſame had been recorded in 1703. The appellant made defences, and the Court, after report of the Lord Ordinary, on the 6th of June 1719, "Found that the preference in the contract libelled on and "produced is perpetual, and that the ſaid contract being con- "cerning a perſonal ſubject, whereon no infeftment followed, "that it is effectual againſt the ſingular ſucceſſors of the con- "tractors; but remitted to the Lord Ordinary to hear parties "how far the appellant is perſonally liable." And to this interlocutor the Court adhered on the 26th of the ſaid month of June.

Parties having accordingly gone before the Lord Ordinary, and the debate being reported by his lordſhip, the Court, on the 11th of November 1719, "Found the price of the lands of Kinglaſs "liable to the reſpondents for payment of the ſums for which "they ſtand preferred by the contract libelled on, and found the "appellant perſonally liable in as far as he had intromitted there- "with."

The appellant then inſiſted, that he ought to have a deduction of the ſums he had paid to Sir Samuel M'Clellan's children, who were creditors of Mr. Clark, to whom he was accountable; and the Court, on the 29th of December 1719, "Found that the "payment to Sir Samuel M'Clellan's children by the appel- "lant was made *bona fide*, and that he muſt have deduction of "the ſaid payment out of the price of the lands of Kinglaſs, re- "ſerving action to the reſpondents againſt the children of the "ſaid Sir Samuel M'Clellan for the ſums received by them as "accords."

The reſpondents afterwards petitioned the Court that he might be accountable for the price which he had received from the ducheſs of Hamilton for the ſaid lands, in terms of the agreement with her Grace, made previous to the ſale. This being referred to the Lord Ordinary, and afterwards reported to the Court, their lordſhips, on the 22d of January 1719-20, "Found that the "appellant

"appellant having made a previous agreement with the Ducheſs "of Hamilton to ſell her the lands of Kinglaſs for 44,000 merks, "and having received the ſaid ſum from the ducheſs, he is liable "for the reſpondent's debts, as if the lands had been ſold at "that ſum."

The appeal was brought from "ſeveral interlocutory ſentences "or decrees of the Lords of Seſſion in Scotland of the 6th of "June, and the 11th of November 1719, and 22d of January "1719-20." Entered, 27 Feb. 1719-20.

Heads of the Appellant's Argument.

The contract yielding a preference of the debts due to Sir James Cockburn and Sir Robert Mill was not abſolute and perpetual, but conditional only, and to take place if the ſale of the eſtate to Dr. Livingſton then projected, ſhould take effect; or if the bargain which by the ſettlement was intended for Dr. Livingſton, ſhould be given to any other perſon.

But ſuppoſing this had been otherwiſe, yet it could only have been effectual againſt, or obligatory upon Walter Riddell, the party contracting, and his heirs, but not againſt a third party purchaſing for a valuable conſideration. Walter Riddell's adjudication was the paramount title to the eſtate; and adjudications, when they become irredeemable by the expiration of the legal, and are completed heritable rights by infeftment (*a*), cannot by the law of Scotland be ſubject to the effect of contracts, or other perſonal deeds of the ancient proprietors of ſuch adjudications in prejudice of a purchaſer bona fide for a valuable conſideration.

Suppoſing ſtill further, that the contract or perſonal deed of Walter Riddell could affect that adjudication whereof he once ſtood poſſeſſed, in prejudice of a purchaſer for a valuable conſideration, yet the appellant was not properly ſuch a purchaſer: he was only in right of the aſſignment from George Clarke, a creditor to Dr. Scott, in whoſe perſon the right to Walter Riddell's adjudication ſtood. However the reſpondents might have been found preferable to Dr. Scott, had they appeared and claimed that preference when the eſtate was brought to a judicial ſale; yet they having neglected to claim in that manner, and the appellant having by the proper courſe of law, as creditor, recovered payment from Dr. Scott of what was due to him out of the price of the lands, cannot be compelled to enter into an account with the reſpondents on this ſingle pretence, that the right, which they omitted to claim, was preferable to that of Dr. Scott his debtor; and therefore he could not be perſonally liable to them for the ſum ſued for.

The higheſt price offered by the appellant at the judicial ſale, for which the lands were by ſentence of the Court adjudged to have been lawfully purchaſed, is that alone which he can be compelled to account for; and he purchaſed the eſtate at the ſale,

(*a*) It appears that this adjudication had not been followed by infeftment.

not as a creditor, but *tanquam quilibet:* and as he muſt have ſtood the loſs if the lands had fallen in value below the price at which he purchaſed them at the judicial ſale, he muſt be entitled to the profit of any more advantageous ſale, which he may have made. Nor does it alter the caſe, that he agreed with the Ducheſs of Hamilton, previous to the ſale, to convey the lands to her at a certain price, if he ſhould be declared purchaſer; becauſe that bargain hindered nobody at the public roup from bidding higher: and it was in view of that advantageous bargain with the ducheſs that the appellant bid ſo high as he did, whereby the creditors were in ſo far benefited. And the appellant is ſo far from having any advantage, that conſidering the debt due to him, which is ſunk, he ſtill has a very hard bargain.

Heads of the Reſpondents' Argument.

Since the two creditors under whom the reſpondents claim, at the time of executing the contract, had not only an excluſive right to all the debtor's perſonal eſtate, and the rents and profits of his real eſtate during his life; but could likewiſe have cut off ſeveral of the debts claimed by the other creditors it could never be imagined they would have quitted all theſe privileges upon the view of a preference only for a limited time. That intention is ſupported by the words of the contract, whereby it is agreed, that in caſe the then intended purchaſer ſhould not hold the bargain, but that the ſame ſhould be given to another (that is, ſold to another) ſtill the ſame preference was to ſubſiſt, and the perſons under whom the reſpondents claim were to be paid their debts; and Walter Riddell, under whom the appellant claims, agreed never to make uſe of his adjudication as a ground of preference, but that both parties ſhould take their ſatisfaction in the way and manner, and according to the diviſion ſpecified in the ſaid contract.

An adjudication till the legal is expired, and till clothed with infeftment (as in the preſent caſe it was not) is but a perſonal right, and may be limited, reſtricted, or conveyed by any perſonal deed: beſides, the appellant cannot claim the benefit of a purchaſer without notice, ſince this contract is taken notice of in all the intermediate conveyances of this adjudication, and it is always conveyed ſubject to the conditions in that contract.

The appellant contended, that even Walter Riddell the adjudger would not have been perſonally liable for theſe debts, and much leſs ought he who received this adjudication in payment of a ſum of money due to him: but though it be true, that the adjudger himſelf, and thoſe claiming under him, are not by the contract perſonally liable; yet the eſtate being liable, if the adjudger had ſold the eſtate and received the money, he muſt have been perſonally liable. And ſince the adjudication is conveyed to the appellant ſubject to that contract, and that by virtue thereof he has received the price, he ought to make ſatisfaction to the reſpondents, the creditors.

The judicial ſale was merely imaginary, for the appellant was both purſuer and defender in the action for carrying it on. Dr. Scott, the perſon againſt whom that ſale was carried on, had no manner of intereſt in the eſtate. The appellant, knowing that he was accountable to the reſpondents, and finding that the Ducheſs of Hamilton intended to be a purchaſer, to prevent that, made a previous agreement with her grace, whereby he bound himſelf to diſpone the lands to her for 44,000 merks Scots, as the price, and to become purchaſer at the ſale for her behoof. Though he purchaſed for a ſmaller ſum, yet that muſt not be reputed the price, ſince it is plain the ſale was carried on with a fraudulent deſign, as appears from all the ſteps of it before taken notice of; and no Court will encourage a truſtee (for ſuch was the appellant's caſe) under any colour to put ſo great a ſum in his own pocket, in defraud of creditors he knew he was accountable to: and the Court, in the action at the inſtance of Sir Samuel M'Clellan's children, decreed the appellant to be accountable for that price.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutory ſentences or decrees therein complained of be affirmed: and it is further ordered, that the appellant do pay or cauſe to be paid to the reſpondents the ſum of 60l. for their coſts in reſpect of the ſaid appeal.* Judgment, 21 May 1720.

For Appellant, *Tho. Lutwyche. Dun. Forbes.*
For Reſpondents, *Rob. Raymond. Will. Hamilton.*

Caſe 70. John Campbell, of Calder, Eſq; - - *Appellant;*
Ruth Pollock, *alias* Campbell, - - *Reſpondent.*

7th *June* 1720.

Perſonal and tranſmiſſible.—A ſum appointed by a father to be paid to a ſon, his heirs, executors, or aſſignees, at a day certain, was tranſmiſſible by the ſon, though he died before that day.

Pactum illicitum.—An eſtate is ſettled by a father upon his ſon and his heirs, reſerving a life-rent to a certain amount, and by the ſon's marriage-contract the eſtate is declared to be of a certain annual value: two years after the marriage the ſon by a deed declares that the eſtate was not worth ſo much *per annum*, but that this was done to pleaſe the wife's friends, and he grants bond to pay or allow the father to charge a ſum upon the eſtate for provisions to his younger brothers and ſiſters, which ſhould be in full of legitim: this was not *contra fidem tabularum nuptialium.*

Implied Diſcharge.—After granting this bond, the ſon made a new diſpoſition of the eſtate to the ſon, in ſame terms with the marriage-contract; but this was not a diſcharge of the bond, allowing the father to charge the eſtate with childrens' proviſions.

Fiar abſolute limited.—In a ſon's marriage-contract it is covenanted, on the part of his father that lands and hereditaments of a certain annual value were to be ſettled and aſſured ſo as that the ſame ſhould come to and be veſted in the eldeſt ſon of the marriage, and other lands and hereditaments to remain to the ſon's uſe, reſerving the father's life-rent of part: the ſon was fiar, and by his bond bound the heirs of the marriage.

BY articles of marriage in the Engliſh form, executed at London, in September 1688, between Sir Hugh Campbell of Calder and Alexander his eldeſt ſon (the appellant's grandfather and father) of the one part; and Lady Suſanna Lort of Turnham Green, widow, and Elizabeth Lort her daughter, of the other part; in conſideration of an intended marriage between the ſaid Alexander and Elizabeth, and of a conſiderable marriage-portion, it was *inter alia* agreed as follows:

That the ſaid Sir Hugh ſhould within three months after the ſaid marriage well and ſufficiently ſettle and aſſure manors, lands and hereditaments of a good, ſure, and indefeaſible eſtate of inheritance in fee ſimple, in poſſeſſion, of the yearly value of 1000 ſterling, over and above all charges and repriſes, to the uſe of Alexander the ſon for life, without impeachment of waſte; remainder, as to part, to the intended wife for life for her jointure; remainder to the firſt and every other ſon of that marriage in tail male, with ſeveral other remainders over: and that the ſaid Sir Hugh ſhould in the ſame three months well and ſufficiently ſettle and aſſure other manors, lands, and hereditaments, within Scotland, of the yearly value of 150*l.* (over and above the firſt mentioned lands of 1000*l.*) to the uſe of the ſaid Sir Hugh for life, and after his deceaſe to the uſe of the ſaid Alexander Campbell for life, without impeachment of waſte, remainder to the uſe of the firſt and every other ſon of the ſaid marriage in tail male with ſeveral remainders over; and that in the deeds of ſettlement to be made of ſuch eſtate there ſhould be contained ſuch proviſo

es, covenants, and agreements as ſhould be neceſſary for carry-
g the ſaid articles into effect.

The marriage accordingly took effect, and in November, 1688,
r Hugh executed a diſpoſition, conveying and granting to the
id Alexander Campbell, and Elizabeth Lort his ſpouſe, and long-
t liver of them two in conjunct fee and life-rent, and to their
eirs male and of tailzie, heritably and irredeemably, certain
nds in Argyleſhire therein mentioned: and Sir Hugh, by the ſame
eed, conveyed and granted to his ſaid ſon Alexander, and his
eirs male and of tailzie, certain other lands therein mentioned.
nd he declared and obliged himſelf that all the ſaid lands were
orth 2500*l.* per annum; and Sir Hugh reſerved his own life-
ent in lands of 1500*l.* per annum.

The whole of the lands, ſo ſettled, were not worth the 2500*l.*
hich they were ſtated to amount to in their annual value, nor
ere they free from incumbrances. The appellant ſtates, that
ey were only worth about 1700*l.* per annum, and charged with
ebts to the amount of 10,000*l.*

In June 1690, the ſaid Alexander the ſon executed a deed, in
hich, after reciting the ſaid marriage-articles and conveyances,
is mentioned, "That the ſame were only entered into to pleaſe
the friends and lawyers of the ſaid Lady Suſanna Lort, that
there might be no ſtop to the ſaid marriage, and upon full aſ-
ſurance given by the ſaid Alexander to his father Sir Hugh,
of diſcharging him of that covenant, that the eſtate ſhould be
clear of all incumbrances, and likewiſe to give him a power to
charge the ſaid eſtate with proviſions for younger children."
n performance of this promiſe, the ſaid Alexander, the ſon, re-
aſes Sir Hugh from the covenant or obligation to make the lands
ttled 2500*l.* per annum free of all debts, and accepts of the
ate as it was, ſubject to and charged with all the debts of the
id Sir Hugh both real and perſonal; and likewiſe gave his bond
ith a power or faculty to Sir Hugh to charge the eſtate ſettled
ith 2000*l.*, to be paid to ſuch of his younger children as he
ould by any deed under his hand appoint and direct; and the
id Alexander obliges himſelf to pay all the debts then owing by
r Hugh, and all ſuch debts as Sir Hugh ſhould contract with
s conſent, and likewiſe the ſaid younger children's proviſions;
pon condition nevertheleſs that this proviſion ſhould be in full
tisfaction of ſuch part and ſhare as they might claim of their
ther's perſonal eſtate after his deceaſe. This deed was a private
nſaction between the father and ſon, of which Lady Suſanna
ort had no notice.

In October 1691, Sir Hugh executed another ſettlement of his
ate, in the ſame terms with that in November 1688, particu-
rly engaging that the ſame was of the yearly value of 2500*l.*,
ee from all incumbrances; and upon this laſt deed infeftment
as taken. The reſpondent mentions, that the occaſion of exe-
ting this ſecond deed was, that certain lands had by miſtake
en omitted in the firſt. Neither this nor the former ſettlement
re in the nature of a ſtrict entail by the law of Scotland.

Alexander the ſon died before his father Sir Hugh in 1696, leaving two ſons, Gilbert (ſince deceaſed) and the appellant. In November 1705, Sir Hugh by a deed executed by him, appointed 1000*l.* ſterling, with intereſt for the ſame from the date thereof, to be paid to Capt. George Campbell his younger ſon, (then wholly unprovided for) his heirs, executors, or aſſignees, at Martinmas 1710, by the heirs, executors, and repreſentatives of the ſaid Alexander: and he gave another proviſion of 10,000 merks Scots to his daughter Anne.

This Capt. George Campbell, having married the reſpondent, with whom he had a portion of 1700*l.* which was laid out in the purchaſe of a commiſſion and military equipage, on the 16th of July 1706 made his laſt will and teſtament in writing, whereby he gave and aſſigned to the reſpondent the ſaid ſum of 1000*l.*, with the intereſt thereof; and made her ſole executrix of his will. He ſoon after went to Spain, on military ſervice, and was killed at the battle of Almanza; and the reſpondent confirmed his teſtament in due form.

Payment of the ſaid bond being refuſed to the reſpondent, ſhe brought an action before the Court of Seſſion thereon, and in February 1712 obtained a decree of conſtitution againſt Gilbert Campbell, the appellant's elder brother, and afterwards in January 1713, a decree of adjudication for the ſame. Having thereupon brought an action of mails and duties, ſhe was now oppoſed by the appellant who had ſucceeded to the eſtate upon his brother's death, and who brought an action for reduction of the ſaid bond. Before commencing this latter action the appellant ſerved himſelf heir of proviſion and heir male in ſpecial to his father, in the barony of Calder, &c.; and at ſame time proteſted that ſuch ſervice ſhould not be conſtrued as a paſſing from the marriage-articles, or ſubjecting himſelf to the payment of his father's or grandfather's debts; and the grounds upon which he inſiſted for reduction of the reſpondent's claims, were, that the obligee dying before the term of payment of the bond, the ſame thereby became void; and that it was alſo void as being granted *contra fidem tabularum nuptialium*.

Upon report of the Lord Ordinary, the Court on the 7th of December 1717 "Found that the bond granted to Captain George "Campbell, his heirs and aſſignees, in anno 1705, payable at "Martinmas 1710, is binding, and was aſſignable by him not-"withſtanding he died before the ſaid term of payment; and "found, that the bond granted by Alexander to his father in "anno 1690 is not reducible as being *contra fidem pactorum nup-"tialium*, albeit it narrates a promiſe given by him to his father "before the marriage in reſpect the ſame was granted long poſ-"terior to the marriage; and that the grantor thereof by the "marriage-articles was provided to the free and full adminiſtra-"tion of the eſtate; and that the granting of a bond for ſuitable "proviſions to unprovided children was a rational deed; and "found, that Sir Hugh Campbell's diſponing the eſtate poſterior "to the bond, did not import a diſcharge thereof, in regard the

"bond

" bond did oblige the ſaid Alexander the grantor perſonally."— To this interlocutor the Court adhered on the 8th of January thereafter.

The appellant reclaimed, and the Court, upon the 8th of February 1718, " found, that the fee of the lands and hereditaments " mentioned in the marriage-articles was thereby provided to " Alexander, notwithſtanding of the clauſe, that lands and here- " ditaments of 1000*l.* ſterling were to be ſettled and aſſured, ſo " as that the ſame ſhould come and be veſted in the eldeſt ſon " of the marriage, and other lands to the yearly value of 1500*l.* " after the deceaſe of Sir Hugh and Alexander were to be ſettled " and aſſured ſo, that the ſame ſhould effectually remain to the " uſe of the ſaid eldeſt ſon of the marriage: but found, that the " private communing betwixt Sir Hugh and Alexander before " the marriage, whereby Sir Hugh was enabled to grant bonds " of proviſion to his younger children, and Alexander to become " obliged to the payment of theſe proviſions, and to undertake " other burdens not mentioned in the ſaid marriage-articles, was " *in fraudem pactorum nuptialium*; and with regard to the bond " granted by Alexander (though long poſterior to the marriage) " on the narrative of the ſaid prior communing, and in implement " thereof, bearing that the ſaid Sir Hugh's engagements and " obligements in the ſaid articles, in ſo far as they were by the " bond libelled, receded from, were only made and granted by " him in compliance with the ſaid Lady Suſanna Lort and her " lawyers and friends, that there might be no ſtop of the marriage, " found that the ſaid bond is not binding on the heir male of the " marriage."

Againſt this interlocutor the reſpondent reclaimed, and the Court, on the 17th of July 1718, " found that the condition in " the bond, that the proviſions to be granted to the children " ſhould be in ſatisfaction of their legitim and executry that " might have fallen to them, is a ſufficient onerous cauſe to ſup- " port the bond, albeit eventually there were no free moveables, " the father having reſerved a fund of 1500*l.* ſterling, yearly, " which might have afforded a fund for proviſions to the children." The reſpondent alſo ſet forth by petition to the Court, that Sir Hugh had, ſubſequent to the marriage-articles, paid debts contracted before that time of a greater value than the ſum in queſtion, which ought to be looked upon as a valuable conſideration for the ſame, and prayed diligence for proving that fact: the Court, on the 5th of December 1718, " ordained the appellant " or his doers to confeſs or deny the fact, viz. That Sir Hugh " did, after the marriage, pay debts contracted before to the value " of the debt ſued for." The appellant petitioned againſt this interlocutor, praying the Court to give judgment upon the points in diſpute, without putting him to the neceſſity of a ſearch through his papers to enable him to acknowledge or deny Sir Hugh's payment of ſome debts: but their lordſhips, on the 12th of December 1718, " granted diligence at the reſpondent's in- " ſtance before anſwer, for proving that Sir Hugh did pay debts

" contracted before the marriage, after the marriage-ſettlement, " to the value of the debt ſued for."

A proof was accordingly adduced, and the Court, on the 29th of January 1719-20, pronounced the following interlocutor: " Having conſidered the ſeveral petitions and anſwers of the ſaid " parties, and the probation adduced by the reſpondent, and the " whole writings and documents in proceſs, eſpecially the mar- " riage-articles, whereby the free and full adminiſtration of the " eſtate was agreed to be ſettled in the perſon of the ſaid Alex- " ander Campbell, with the bond by the ſaid Alexander to Sir " Hugh, containing a faculty to the father to grant competent " proviſions to his unprovided children, not exceeding 2000*l.* " ſterling, in full ſatisfaction of their legitim and portion natu- " ral, and all that could fall to them by their father's deceaſe, " and the valuable proviſions and life-rent reſerved to the father " by the ſaid marriage-articles, whereby he had a ſufficient " fund to have provided for his children, if the ſaid bond and fa- " culty had not been granted, *adhere* to the ſaid interlocutor of " the 17th of July, 1718; and find that the bond of proviſion in " favour of Captain George Campbell, the reſpondent's huſband " is a binding obligation on the appellant; and therefore affoilzie " the reſpondent from the ſaid proceſs of reduction at the inſtance " of the appellant againſt her."

Entered 3 Feb. 1719-20.

The appeal was brought from " ſeveral interlocutory ſen- " tences or decrees of the Lords of Seſſion of the 7th of " December 1717, and the affirmance thereof the 8th of Ja- " nuary following; alſo from the interlocutors of the 8th of " February 1718, the 17th of July and 12th of December 1718, " and alſo from another interlocutor of the 29th of January " 1719-20."

Heads of the Appellant's Argument.

By the expreſs words of the marriage-articles, Alexander the ſon was only to be *tenant for life, with remainder to his firſt and every other ſon;* and theſe articles muſt ſtill be the rule, for the deeds of 1688 and 1691, executed by Sir Hugh, whereby Alexander was made tenant in tail, were not in purſuance of the ſaid articles, but a direct violation of them.

The deed executed by Alexander the ſon, releaſing Sir Hugh of any of the covenants in the marriage-articles, and empowering him, notwithſtanding thereof, to charge the eſtate with debt, was, as the appellant apprehends, a direct fraud againſt the articles: for as Alexander, who was bound jointly with Sir Hugh in theſe articles, could not releaſe Sir Hugh's covenants in favour of the iſſue of the marriage; ſo Sir Alexander being by the articles intended to be only tenant for life, he could not do any thing, nor contract any debt, to be a charge on the eſtate.

The grant or aſſignment of all Sir Hugh's perſonal eſtate could not be any valuable conſideration to ſupport that deed, even though Alexander could have done any thing to encumber the eſtate; becauſe the perſonal eſtate was of no value, Sir Hugh being

being indebted to the iſſue of the marriage in about 25,000*l.*, the lands ſettled being deficient 800*l.* per annum of the value he covenanted they ſhould be, and beſides charged with 10,000*l.* of debt.

Nor is it of conſequence, that Sir Hugh might after the marriage have paid debts to the value of 2000*l.* For, were that true, (which is ſtill denied), yet he did no more than he had covenanted to do as by the articles the eſtate ſettled was to be free from all incumbrances.

Heads of the Reſpondent's Argument.

The appellant contended in the court below, that the bond being only payable at Martinmas, 1710, and the obligee dying before that time, it thereby became void, and that theſe words, "with power to the ſaid Captain George Campbell and his "above-written, after elapſing of the term of payment, to aſk, "crave, &c. *and diſpoſe of the ſame*," did imply, that the reſpondent's huſband could only diſpone or aſſign the bond after the term of payment was elapſed. But it is plain from the bond itſelf, as well as from the circumſtances in which the parties were at the time of granting it, that the bond is abſolute, bearing no condition, only the term of payment ſuſpended to a day certain, which never imports a condition. There is a great difference between a bond of proviſion, payable at a preciſe time in ſuch a year, and one payable to children at a certain age, which laſt has been underſtood to be conditional; but this bond is payable not only to George Campbell himſelf expreſsly, but to his heirs, executors, or aſſignees. He and the reſpondent were married a conſiderable time before the date of the bond; ſo that it was not to be imagined that the father deſigned that the bond ſhould become void, if his ſon died before the time of payment; and that his wife and children, if there had been any, ſhould have wanted ſubſiſtence, which muſt have been the conſequence, if the bond were conditional. But the plain reaſon why the payment of the principal was ſuſpended till the year 1710, was that, at the date of the bond, the appellant's elder brother was a minor, and if he had lived would have been of age before Martinmas 1710: and therefore Sir Hugh, leſt his guardians ſhould have thought themſelves under any neceſſity of paying the principal ſum for the eaſe of the eſtate, ſuſpended the payment of it till his grandchild ſhould be of age.

The granting of the faculty, by Alexander to Sir Hugh, was a rational deed; nothing being more juſt, than that the ſon, on whom the father had ſettled his whole, and even ſo great an eſtate, ſhould conſent to ſo ſmall a proviſion as one year's rent thereof to his five brothers and ſiſters; nor is it every burden impoſed by a ſon upon an eſtate diſponed to him and the heirs of the marriage, that can be reduced as *contra fidem*; but only a burden fraudulently impoſed, without either an onerous or rational cauſe. And as the deed was rational, ſo it was onerous, ſince it was granted with this expreſs condition, that it ſhould be in lieu

lieu and ſatisfaction to thoſe children of their ſucceſſion to their father's moveable or perſonal eſtate, which was wholly to pertain to the ſaid Alexander, and might have amounted to more than the ſum thereby provided to the younger children.

Deeds againſt the faith of marriage-articles muſt be done either before or after the contract, and before the marriage; but the granting of this faculty was a deed done deliberately two years after the marriage, when the ſaid Alexander was under no reſtraint, or apprehenſion of his marriage being hindered by his father. The ſettlement was already made and perfected, and the ſaid Alexander had thereby the abſolute fee of the eſtate, and might have contracted what debts he pleaſed thereon, there being no irritant or reſolutive clauſe in the ſettlement againſt it.

The appellant is ſerved not only heir of proviſion in general of the marriage, but heir male in ſpecial to his father, in the barony of Calder, &c. and ſo cannot quarrel any of his father's voluntary and gratuitous deeds, much leſs ſuch an onerous and rational deed as the preſent.

The appellant contended that the faculty granted by Alexander was diſcharged by the diſpoſition 1691. with abſolute warrandice, which reſerved no faculty to burden the eſtate. But this diſpoſition, 1691, was only to ſupply an omiſſion in the former diſpoſition as to ſome of the lands that had not been inſerted therein, as appears by the narrative whereon it proceeds. The warrandice in that diſpoſition can never be interpreted ſo as to warrant againſt the ſaid Alexander's own deeds, as thoſe proviſions in effect were, though the father had the power of diviſion. The deed granted to the father contains not only a faculty to burden the lands, but alſo a perſonal obligation on the ſon to pay proviſions to the extent of 2000*l.*; ſo that if the faculty to burden the lands were extinguiſhed, yet the perſonal obligation would ſtill remain.

As a further onerous cauſe for ſupporting the ſaid bond, the reſpondent did prove in terms of the probation granted to her, by her witneſſes and vouchers produced in the court below, that Sir Hugh had, after the marriage, paid above 2500*l.* ſterling for debts of that family, contracted before the marriage, and might have proved much more; all which he might have given to his younger children if he had looked upon them as unprovided for.

Judgment, 7 June 1720. After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the ſeveral interlocutory ſentences or decrees therein complained of be affirmed.*

For Appellant, *Rob. Raymond. Will. Hamilton.*
For Reſpondent, *Tho. Lutwyche. Sam. Mead.*

In the Dictionary of Deciſions, vol. 2. p. 22. voc. *Pactum illicitum*, the interlocutory judgment of the Court of Seſſion (8th February, 1718), finding the bond granted in this caſe to have been *contra fidem tabularum nuptialium*, and therefore not binding on the heir of the marriage, is ſtated as an exiſting caſe. But that judgment was afterwards reverſed by the Court of Seſſion and ſuch reverſal affirmed upon appeal.

Ex parte

The Commiſſioners and Truſtees of the Forfeited Eſtates, - - - - *Appellants;* Caſe 71.

George Ogilvie of Lunan, and Mr. John Ogilvie of Balbegno, Advocate, - - *Reſpondents.*

14th *December* 1720.

Forfeiture for Treaſon.—Kirk Patrimony.—1 *G.* 1. *c.* 20.—This act for the encouragement of vaſſals continuing loyal, gave them a right to hold their lands, &c. of the Crown, in the ſame manner as they were held by the ſuperior forfeited for treaſon: but vaſſals in church-lands, who had not claimed the benefit of the acts 1633 and 1661, annexing the ſuperiorities of church-lands to the Crown, and had paid their feu-duties to a ſubject ſuperior, without receiving any new inveſtiture from him, were not on his attainder entitled to the benefit of the ſaid act, 1 G. 1. c. 20., but found to have right to hold of the Crown on payment of the ſame feu-duties, &c. as paid to the forfeiting perſon.

THE lands of Lunan, belonging to the reſpondents, were, before the reformation, holden of the abbot and abbey of Aberbrothock. After the reformation, the lands, ſuperiorities, and other rights, belonging to that abbey, devolved upon the crown, and were by the king erected into a temporal lordſhip in favour of the Marquis of Hamilton, who in virtue of the grant to him, became ſuperior to the vaſſals of the abbey, and particularly to one Guthrie of Lunan under whom the reſpondents claim. The Marquis of Hamilton conveyed his right to the premiſes to the then Earl of Panmuire.

By an act of parliament, 1633, c. 14. intituled "Act anent "ſuperiorities of Kirklands," the ſuperiority of all lands, baronies, &c. erected into temporal lordſhips or livings, as alſo the whole feu-farms and other rents of the ſaid ſuperiorities for all years after the day therein mentioned, were annexed to the crown, reſerving to the Lords of Erection the feu-farm rents of their ſaid ſuperiorities until they ſhould be redeemed by the crown by payment of a certain price as fixed by that act. This act is ratified by another act of parliament 1661, c. 53. intituled "Act "ratifying the act of parliament 1633, anent the annexation of "his majeſty's property, &c." In conſequence of theſe acts, the vaſſals who before the reformation held their lands of religious houſes, and who after the reformation and before the ſaid act 1633 held their lands of the Lords of Erection, after the ſaid act 1633 became vaſſals, and have been entitled from that time to hold their lands of the crown. 1633, c. 14. 1661, c. 53.

James late Earl of Panmuire being by act of parliament attainted of high treaſon, and his eſtate ſurveyed by the appellants, as veſted in them for the uſe of the publick, the reſpondents by virtue of a clauſe in the act 5 G. 1. c. 22. intituled, "*An Act* "*for enlarging the time to determine the claims on the forfeited eſtates,*" preſented 5 G. 1. c. 22.

preſented their exceptions to the Court of Seſſion in Scotland,
1 G. 1. c. 20. ſetting forth "that by an act 1 G. 1. c. 20. intituled '*An Act for encouraging all ſuperiors, vaſſals*', &c. it is enacted, that if any of his majeſty's ſubjects of Great Britain, having lands or tenements in Scotland, in property or ſuperiority, ſhould be guilty of the high treaſons therein deſcribed, every ſuch offender, who ſhould be thereof duly convicted and attainted, ſhould be liable to the pains, penalties, and forfeitures for high treaſon; and that every vaſſal and vaſſals in Scotland, who ſhould continue peaceable and in dutiful allegiance to his majeſty, holding lands or tenements of any ſuch offender, who held ſuch lands or tenements immediately of the crown, ſhould be veſted and ſeized, and are thereby ordained to hold the ſaid lands or tenements of his majeſty, his heirs, and ſucceſſors in fee and heritage for ever, by ſuch manner of holding as any ſuch offender held ſuch lands or tenements of the crown at the time of the attainder of ſuch offender. And alſo ſtating, that the reſpondents held the lands of Lunan of the late Earl of Panmuire as their ſuperior; and that the ſaid late earl held the ſaid lands immediately of the crown; and that therefore the reſpondents were entitled to hold the lands immediately of the crown, by ſuch manner of holding as the late Earl of Panmuire held them of the crown at the time of his attainder.

The Court of Seſſion thereupon (*a*) found "that on the 24th day of June, 1715, the property of the ſaid lands of Lunan, and others mentioned and deſcribed in the ſaid exceptions and writs foreſaid, produced for the exceptants, did belong to the exceptants George and Mr. John Ogilvies; and that the ſamen held of the late Earl of Panmuire, attainted as their ſuperior thereof; and find that the ſaid exceptants did do diligence in terms of the act of parliament, anno 1 Geo. intituled '*An Act for encouraging all ſuperiors*,' &c.: and therefore found and declared in virtue of the ſaid act, that the exceptants George and Mr. John Ogilvies had the only right, title, and intereſt, to the property or *dominium utile* of the ſaid lands, and have right to hold the ſamen now immediately of the crown, with the burthen of a proportion of the debts in terms of the late act of parliament, *Anno* 5 *Georgii*, intituled '*An Act for enlarging the time to determine claims on the forfeited eſtates*,' after the form and tenor of the above exception, acts of parliament above and therein mentioned, and writs foreſaid produced for the exceptants, in all points."

The decree being extracted, the appellants brought an action for reduction thereof, ſetting forth that the decree was erroneous, for that the reſpondents never were vaſſals to the late earl of Panmuire, nor was the ſaid late earl, nor any of his predeceſſors, ſuperiors of the lands of Lunan ſince the ſaid act of parliament, 1633, c. 14. annexing the ſuperiorities of all church lands to the crown; but that ſince that time the crown was ſuperior of the lands of Lunan, and that conſequently

(*a*) No date to this interlocutor is given in the Appeal Caſe.

the

the reſpondents were not within the proviſions of the Act *for encouraging all ſuperiors, vaſſals*, &c: And that the reſpondents had not obtained themſelves infeft within the time limited by the act of parliament.

The reſpondents made defences, contending that though by the act 1633, the ſuperiorities of church-lands were annexed to the crow., and that act was ratified by another act in 1661, yet there is a proviſo in the laſt recited act in theſe words, "It is always "declared, that notwithſtanding of this act, any who have gotten "or ſhall get any new infeftment of ſuperiority of Kirklands the "ſame ſhall ſtand good as to ſuch vaſſals, who have given their "conſents to the ſaid right of ſuperiority," and that the caſe of the reſpondents was comprehended under this proviſo: for one Guthrie under whom they claim, in the year 1614 conſented to the Marquis of Hamilton's right of ſuperiority (in whoſe place the late Earl of Panmuire came) by accepting a charter from the ſaid marquis and being infeft thereon (*a*). And, that although the reſpondents did not obtain themſelves infeft within ſix months after the attainder, yet they offered a charter in the exchequer to be paſſed in the ordinary form within ſix months after the attainder of the late Earls of Panmuire which was proved by two witneſſes; and that this was *doing diligence to attain poſſeſſion, in terms of the act of parliament.*

The Court thereupon, on the 31ſt of October, 1719, found, "that there was no ground for a reduction."

The appeal was brought from "an interlocutory ſentence or "decree of the Lords of Seſſion pronounced the 31ſt of October "1719." Entered, 18 Dec. 1719.

Heads of the Appellants' Argument.

The reſpondents did not hold the lands of Lunan of the late Earl of Panmuire, they having never been infeft as vaſſals to him; and therefore they can claim no benefit from the clauſe in the act 1 Georgii, which is only in favour of vaſſals, holding lands of a ſubject ſuperior attainted for treaſon.

After the act 1633, neither the anceſtors of the late Earl of Panmuire, nor himſelf, were ſuperiors of the lands of Lunan, but the crown was ſuperior, and continues ſo to this day.

With regard to the proviſo in the act 1661, that proviſo has a plain relation to new infeftments of ſuperiority, granted by the crown, with conſent of the vaſſals, to the Lords of Erection after the year 1633, but hath no manner of relation to infeftments granted before the year 1633, thoſe, ſo far as concerns the ſuperiorities being entirely made void by that act. The reſpondents did prove that Guthrie, in whoſe right they claim, was infeft by a charter from the Marquis of Hamilton in the year 1614: but they do not prove that the late Earl of Panmuire, or any to whom he ſucceeded, did obtain a new infeftment from the crown of the ſuperiority of Lunan, with conſent of the vaſſal;

(*a*) It does not appear that any charter or precept ſubſequent to this had been received by the vaſſals.

and

and except that had been done, the late Earl could not be f
or have any benefit by the aforeſaid proviſo.

With regard to the reſpondent's having offered a charte
exchequer, the act of parliament requires, that a vaſſal
obtain himſelf infeft within ſix months after the attainde
ſuperior, which the reſpondents have not done: and the pre
a charter in the exchequer was not obtaining themſelve
nor a doing diligence to attain poſſeſſion. Nor have thoſ
in the act of parliament, *do diligence for attaining poſſeſſion*,
lation to vaſſals, but to ſuperiors: vaſſals were to obtair
ſelves infeft: ſuperiors to do diligence for attaining poſſeſ

But if the reſpondents did preſent a charter to be paſſe
exchequer within ſix months after the late Earl of Pan
attainder, no reaſon can be given why that charter was not
and the reſpondents infeft thereon, other than this that th
of Exchequer refuſed to paſs it, in regard the reſpondents
in the caſe provided for by the act of parliament *for enco
all ſuperiors, vaſſals*, &c., as they were not vaſſals to the
earl, nor he their ſuperior. And it is certain in fact that
chequer did refuſe to paſs charters upon that act of parlia
others, who were in the ſame circumſtances with the reſpo
judging them not entitled to ſuch charter, and their caſe n
prehended within the act of parliament.

The appellants therefore conceive, that the reſpondents
entitled to hold the lands of the crown in the ſame ma
they were holden before the attainder of the late Earl
muire, and that the reſpondents ought to pay the ſame fe
to the appellants for the uſe of the publick, that they were
and uſed to pay to the late Earl of Panmuire before his atta

Judgment, 14 Dec. 1720. *Whereas this day was appointed for hearing counſel upon t
tion and appeal, as alſo upon the anſwer of the reſpondents; cou
peared for the appellants, and were heard (none attending for
ſpondents), and being withdrawn; after due conſideration had
was offered in this caſe, it is ordered and adjudged, that the in
tory ſentence or decree complained of in the ſaid appeal be re
and it is declared that the reſpondents are entitled to hold the
their exceptions mentioned of the Crown, in the ſame manner
were holden before the attainder, of the late Earl of Panmuir
that the reſpondents ought to pay the ſame feu-duties to the ap
for the uſe of the public, that they were obliged and uſed to pa
late Earl of Panmuire before his attainder.*

For Appellants, *Phi. Yorke. Ro. Dundas.*

Ex parte

The Commiſſioners and Truſtees of the Forfeited Eſtates, - - - *Appellants*; Caſe 72.

Sir James Mackenzie of Royſton, one of the Senators of the College of Juſtice, - - *Reſpondent.*

19th *December* 1720.

Forfeiture for Treaſon.—Recognition to a loyal Superior.—1 *Geo.* 1. *c.* 20.—An act of parliament having enacted, that the lands of thoſe guilty of high treaſon, held of ſubject ſuperiors, ſhould recognoſce and return into the hands of the ſubject ſuperior who continued loyal; John Grant, an attainted perſon, held his lands of Alexander Mackenzie as his immediate ſuperior: this Alexander was alſo attainted, and he held of Lord Royſtoun as his ſuperior, Lord Royſtoun holding of the Crown: by the attainder of Grant, Lord Royſtoun was not entitled to the property of Grant's eſtate, but the ſame was forfeited to the Crown.

JOHN GRANT of Glenmoriſtoun, proprietor of the lands of Auchnacaldan, &c. being attainted for high treaſon, the appellants cauſed his eſtate to be ſurveyed as veſted in them for the uſe of the public.

The reſpondent preſented his exceptions to the Court of Seſſion ſtating that John Grant, the forfeiting perſon, did hold the premiſes of Alexander Mackenzie of Fraſerdale, who was likewiſe attainted for high treaſon, and that Alexander Mackenzie of Fraſerdale held the ſame lands of the reſpondent as his ſuperior: and contending, that as the ſaid Alexander Mackenzie and John Grant were ſo attainted he the reſpondent had right to the lands and eſtate of the ſaid John Grant, in virtue of a clauſe in the act of parliament, 1 G. 1. c. 20. intituled '*An act for encouraging all ſuperiors, vaſſals*,' &c. whereby it is enacted, "that "if any ſubject of Great Britain holding lands or tenements of "a ſubject ſuperior in Scotland has been or ſhall be guilty of "ſuch high treaſon or treaſons (as in the ſaid act mentioned) "every ſuch offender who ſhall be thereof duly convicted and "attainted, ſhall be liable to the pains, penalties, and forfeitures for high treaſon, and his lands or tenements, held of "any ſubject ſuperior in Scotland, ſhall recognoſce and return "into the hands of the ſuperior, and the property ſhall be and "is thereby conſolidated with the ſuperiority, in the ſame manner as if the ſame lands or tenements had been by the vaſſal "reſigned into the hands of his ſuperior *ad perpetuam remanentiam*:" and the reſpondent therefore prayed that the premiſes might be adjudged to belong to him as ſuperior, in terms of the ſaid act of parliament. 1 G. 1. c. 20.

To theſe exceptions the appellants made anſwers; and the Court, on the 20th of Auguſt 1719, "found that the exceptant "had right to the property of the forty-ſhilling land of Auchna"caldan, &c., part of the barony of Glenmoriſtoun, which were "holden

" holden of the exceptant, as immediate ſuperior by Alexander " Mackenzie late of Fraſerdale, and of the ſaid Alexander Mac- " kenzie by John Grant late of Glenmoriſtoun; by the attainder " and conviction of the ſaid John Grant late of Glenmoriſtoun, " and Alexander Mackenzie late of Fraſerdale, ſince the " 24th day of June 1715 years, and before the 24th day of June " 1718 years, for treaſon committed before the 1ſt day of June " 1716 years: and found that the exceptant had right to the " rents, profits, and iſſues payable for the ſaid lands and others " from and ſince the ſaid 24th day of June 1715 years, with the " burden of a proportion of the debts in the terms of the act of " parliament 5 Geo., intituled '*An act for enlarging the time to* ' *determine claims on the forfeited eſtates;*' and found, that the " public had no right nor intereſt therein by the attainder or " conviction of the ſaid John Grant late of Glenmoriſtoun, and " Alexander Mackenzie late of Fraſerdale; and therefore ſuſ- " tained the exception preſented by the ſaid Sir James Macken- " zie; and found, decerned, and declared accordingly."

Entered, 21 Dec. 1719.

The appeal was brought from " an interlocutory ſentence or " decree of the Lords of Seſſion, pronounced the 20th of Auguſt, " 1719."

Heads of the Appellants' Argument.

John Grant, the forfeiting perſon, whoſe eſtate the reſpondent claims, did not hold that eſtate of the reſpondent as ſuperior, but of Alexander Mackenzie of Fraſerdale, and therefore the eſtate could not recognoſce or return into the reſpondent's hands by the treaſon or attainder of John Grant.

If the ſaid John Grant's eſtate had recognoſced by his treaſon or attainder to any ſubject ſuperior, then it muſt have recognoſced to Alexander Mackenzie of Fraſerdale, he being John Grant's ſuperior. But Alexander Mackenzie having rendered himſelf incapable of claiming that benefit by his going into the rebellion himſelf, the act of parliament takes no place as to the eſtate of John Grant: that eſtate is forfeited to the Crown, and to no ſubject ſuperior.

The appellants do admit, that in ſo far as Alexander Mackenzie was intereſted in the eſtate, his right does recognoſce and return to the reſpondent; but no more can return to the reſpondent than what belonged to Alexander Mackenzie; that is, the right of ſuperiority, but not the right of property, which belonged to John Grant.

The reſpondent contended, that though the eſtate would not have belonged to him by the treaſon and attainder of John Grant alone, yet Alexander Mackenzie, immediate vaſſal to the reſpondent in that eſtate, and immediate ſuperior to John Grant, being likewiſe attainted, the reſpondent thereby became ſuperior to John Grant, and as ſuch was entitled to the benefit given by the act of parliament. But this proceeds upon a miſtake, as if the right and vaſſalage holden by John Grant of Alexander Mackenzie, were, by the treaſon of John Grant, extinguiſhed, and conſolidated

olidated with the right that was in the perſon of Alexander Mackenzie. This, however, will not hold, for the act of parliament only declares the right of the vaſſal to be conſolidated with he ſuperiority, where the ſuperior did continue loyal and dutiful: ut Alexander Mackenzie having been guilty of treaſon, this guilt lid hinder John Grant's right of vaſſalage from being conſolidated vith Alexander Mackenzie's right of ſuperiority; and that right of vaſſalage does ſtill ſubſiſt, and is forfeited to the Crown. Nor an the reſpondent ever claim the eſtate of John Grant by the ttainder of Alexander Mackenzie, unleſs he can firſt make it appear that John Grant's eſtate was lodged in Alexander Mackentie's perſon.

A petition was preſented to delay the hearing, by the reſpondent's agent, praying, "In regard the petitioner has not received "the remittances from Scotland he expected, and being unable "to raiſe money at this juncture for defraying the expences in "this cauſe; that the time for hearing the ſame may be en-"larged." The Houſe being informed, that the appellants' counſel were attending, proceeded to hear the appeal, and made the following order thereon: Journal, 19 Dec. 1720.

Whereas this day was appointed for hearing counſel upon this appeal, as alſo upon the anſwer put in thereto; counſel appeared for the appellants and were heard (none attending for the reſpondent), and being withdrawn; after due conſideration of what was offered in this caſe, it is ordered and adjudged, that the interlocutory ſentence or decree complained of in the ſaid appeal be reverſed. Judgment.

For Appellants, *Ro. Dundas. Sam. Mead.*

The Commiſſioners and Truſtees for the Forfeited Eſtates, - - - *Appellants;*

Sir George Stewart of Balcaſky Bart. Heir of John Stewart Eſq; of Grantully, deceaſed, - - - - - *Reſpondent.*

Caſe 73.

21ſt *Dec.* 1720.

Forfeiture for Treaſon.—Recognition to a loyal Superior.—1 *G.* 1. *c.* 20.—An act of parliament gave to ſuperiors, continuing dutiful and loyal, the eſtates of attainted vaſſals: to a vaſſal claiming the eſtate of his vaſſal, it is objected, on the 12th of September 1719, that he had not continued dutiful and loyal, but had correſponded with the Pretender, entertained him at his houſe, and given him a preſent of plate: the Court of Seſſion, on the 29th of October, two days before their powers expired, granted the objectors a proof; and no proof being adduced on the 31ſt, circumduced the term againſt them; and decerned in favour of the claimant: the judgment is reverſed.

JOHN STEWART, late of Kynachin, attainted, was ſeiſed and poſſeſſed of the lands of Borlick, and Mill thereof, which he held of John Stewart of Grantully, as his ſuperior.

John Stewart of Kynachin being attainted of high treaſon 1716, John Stewart of Grantully as ſuperior, in terms of the act of parliament 1 G. 1. c. 20. "for encouraging all ſuperiors" &c. claimed the ſaid lands of Borlick and Mill thereof as recognoſced and returned into the hands of the ſuperior, and that the property was conſolidated with the ſuperiority, in the ſame manner as if they had been reſigned in the hands of the ſuperior *ad perpetuam remanentiam*. He alſo obtained himſelf infeft in the premiſes and did diligence in manner pointed out by the act, by means of which he attained poſſeſſion.

The eſtates of all perſons attainted having been by act of parliament veſted in the appellants, for the uſe of the publick, they cauſed ſeize and ſurvey the ſaid lands of Borlick and Mill thereof, as belonging to Stewart of Kynachin the attainted perſon. John Stewart of Grantully, the ſuperior, thereupon in purſuance of the act 5 Georgii, c. 22. intituled "an act for enlarging the time "for determining claims on the forfeited eſtates" preſented his exceptions to the Court of Seſſion againſt ſuch ſeizure and ſurvey inſiſting upon his right to the lands in queſtion, in terms of the act for "encouraging all ſuperiors," &c. The appellants on the 12th of September 1719, put in their anſwers to theſe exceptions admitting John Stewart of Grantully's right of ſuperiority, and that he had done diligence in the terms preſcribed by the act; but they contended that he was not entitled to the premium contained in the act for "encouraging all ſuperiors," &c., which was only intended for ſuperiors continuing "dutiful and loyal;" whereas the appellants inſiſted, John Stewart of Grantully had not continued dutiful and loyal, but had correſponded with the pretender, entertained him at his houſe when in Scotland, and ſent him a preſent of plate, &c.

When the cauſe came to a hearing, the counſel for John Stewart of Grantully denied the ſeveral facts charging him as undutiful and diſloyal, and contended that he had always behaved as became a good ſubject; but they inſiſted further, that though the facts ſtated by the appellants had been true, yet that no proof could be taken of them, as they inferred the crime of high treaſon, which could only be tried by a jury; they alſo pleaded that a proof and proſecution for theſe alleged facts was barred by the
7 G. 1. c. 29. act of indemnity, in none of the exceptions to which the exceptant was named. On the 29th of October 1719, the Court "found, that ſuch facts as may infer undutiful and unpeaceable "behaviour to his majeſty, may ſtill be proved by the publick, "notwithſtanding of the indemnity, in order to debar the ſaid "John Stewart of Grantully from the premium allowed to dutiful ſuperiors by the act 1mo Georgii, intituled "an act for encouraging all ſuperiors, vaſſals," &c. and before anſwer granted "warrant for letters of firſt and ſecond diligence for the publick "to prove the facts alleged in their anſwers, or any other that can "import undutiful and unpeaceable behaviour of the ſaid John "Stewart of Grantully to his majeſty, to be reported againſt "Saturday next the 31ſt of October." By act of parliament this

this was the laſt day on which the Court of Seſſion could hear or pronounce judgment upon theſe exceptions.

The cauſe being accordingly called on the 31ſt of October 1719, and no proof having been produced for the appellants, the Court "circumduced the term againſt them for not proving in "terms of their former interlocutor; and found that in virtue of "the acts of parliament referred to in the exceptions, the re- "ſpondent has right to the property of the lands of Borlick and "others contained in the exceptions and vouchers thereof, which "were holden of the ſaid John Stewart of Grantully, by John "Stewart late of Kynachin now attainted; and found that the "ſaid John Stewart of Grantully had right to the rents, profits, "and iſſues payable for the ſaid lands and others from the ſaid "24th of June 1715, and in time coming, with the burden of the "debts in terms of the late act of parliament, anno 5to Georgii, "intituled "an act for enlarging the time for determining claims "upon the forfeited eſtates."

The appeal was brought from an interlocutory ſentence or decree of the Court of Seſſion of the 31ſt of October 1719. Entered, 21 Dec. 1719.

Heads of the Appellants' Argument.

The Court of Seſſion did not admit the appellants to the proof of the diſloyalty of John Stewart of Grantully, when they gave in their anſwers upon the 12th of September 1719, but delayed giving their judgment till the 29th of October, and they then gave the appellants only two days time to prove the ſeveral facts of diſloyalty inſiſted upon, when at the ſame time, they could not in that ſpace bring evidence of theſe facts from a remote county, where Stewart of Grantully lived.

Heads of the Reſpondent's Argument.

Though John Stewart of Grantully thought he had very good reaſon to appeal againſt ſuch part of the judgment as allowed any proof of the facts inſiſted upon, which was in a manner proving treaſon againſt him in an irregular way after the indemnity, and after the three years limited for ſuch proſecutions; yet he, conſcious of his own innocence ſubmitted to this irregular mode of inquiry. But when that liberty was granted, the appellants did not aim at examining one witneſs, or take out any order for that purpoſe; though doubtleſs there were at that time in Edinburgh abundance of people thoroughly converſant with Stewart of Grantully's behaviour during the whole time of the rebellion. As to the ſhortneſs of the time the appellants complain of it without any ground, for when this cauſe was firſt under the conſideration of the Court, the appellants did not pray for a commiſſion to examine witneſſes; and when the Court, after an adjournment, met again on the 22d of October, yet the appellants never endeavoured to bring on the cauſe or prayed for ſuch commiſſion, though they knew that the Court was limited to determine all theſe caſes before the 1ſt of November. When the cauſe was at length heard, the Court indulged the appellants with the commiſſion

they aſked but they made no uſe of it. Notwithſtanding ſhortneſs of the time, which was all that the judges could if there had been any ground for this inquiry, there is no but the appellants would have had their witneſſes in readi and any negligence on their part cannot hurt the reſponden deprive him of the benefit allowed by act of parliament periors, ſince he has done every thing which that act require

Judgment, 21 Dec. 1720.

After hearing counſel, *The queſtion was put, whether the ſa cree ſhall be reverſed: it was reſolved in the affirmative.*

For Reſpondent. *Sam. Mead. Will. Hamilton.*

The report of this cauſe was taken from the printed caſ the reſpondents only; that for the appellants could not be f after a ſearch in ſeveral publick and private libraries.

Caſe 74. Foſter's Crown Law, p. 82.

The Commiſſioners and Truſtees of the Forfeited Eſtates, - - - *Appellan*
Patrick Farquharſon late of Inveray, Eſq; *Reſpond*

9th *Jan.* 1720-1.

Caſus Demonſtratio —Miſnomer.—The attainder and forfeiture of *Al* Farquharſon, did not affect a perſon of the ſame ſurname and deſc but bearing the Chriſtian name of *Patrick*.

Vide Commiſſioners of Forfeitures v. Gordon. No. 60 hereof.

BY an act of parliament 1 Geo. 1. c. 42., it was enacted, if amongſt others, *Alexander* Farquharſon of Inveray, ſ not render himſelf to one of his majeſty's juſtices of the p on or before the laſt day of June 1716, he ſhould ſtand atta of treaſon from the 12th of November 1715. By virtue o other acts of parliament 1 Geo. 1. c. 50., and 4 Geo. 1. the appellants ſeized and ſurveyed the reſpondent's eſtate as v in them, by the attainder of *Alexander* Farquharſon.

The reſpondent in terms of the act 5 Geo. 1. c. 22. pref his exceptions to the Court of Seſſion, ſetting forth his title t lands ſo ſeized and ſurveyed, and contending that the attaind *Alexander* Farquharſon did not affect him; and the Court'o 19th of Auguſt 1719, gave judgment in his favour.

Entered, 18 Dec. 1719.

The appeal was brought from "an interlocutory ſenten "decree of the Lords of Seſſion of the 19th of Auguſt 171

Judgment, 9 Jan. 1720-21.

After hearing counſel, *It is ordered and adjudged, that th petition and appeal be diſmiſſed, and that the interlocutory ſente decree therein complained of be affirmed.*

This appeal is on a point preciſely ſimilar, with that a Alexander Gordon of Auchintoule, 25th February 171

No. 60 of this Collection, it is not neceſſary to be further ſtated. No printed caſes in the preſent appeal were found; perhaps none might be printed.

The Commiſſioners and Truſtees of the Forfeited Eſtates, - - - *Appellants;* Caſe 75.
John Hog, Merchant in Edinburgh, - *Reſpondent.*

18th *Jan.* 1720-21.

Truſt.—Forfeiture for Treaſon.—A diſpoſition held ineffectual to convey an eſtate, which was executed by a truſtee, and not conſented to by the truſter.

UPON the attainder of the Viſcount of Kenmuir for high treaſon, the appellants cauſed ſeize and ſurvey the ancient eſtate of the family. The reſpondent by virtue of the act 5 G. 1. c. 22. put in his exceptions to the Court of Seſſion, againſt the ſaid ſurvey, in ſo far as concerned ſome houſes and lands, lying near the town of New Galloway. He ſtated that he had purchaſed theſe houſes and lands from George Hume of Whitfield, with conſent of Captain James Dalzell; and he produced a diſpoſition in his favour with ſaſine thereon, dated in 1712. Both theſe perſons were attainted after that date, for high treaſon.

The appellants ſtated in anſwer to this, that the eſtate of Kenmuir, was about the year 1643, charged with ſo much debt, that it was judged expedient to purchaſe decrees of appriſing to be held by a truſtee for the behoof of the Viſcounts of Kenmuir. That accordingly a decree of appriſing was purchaſed for this purpoſe in 1646, which after ſome meſne conveyances came to the hands of George Hume of Whitfield, ſtill as a truſtee; and he was ſeiſed in the eſtate by virtue of a charter from the crown in 1701. That this George Hume, in 1711 transferred his truſt right to Captain James Dalzell, but the latter was not infeft; and that the conveyance by Hume and Dalzell to the reſpondent was void, being made by the truſtee, without any conſent by the viſcount of Kenmuir.

The Court of Seſſion on the 15th of September 1719, "found "that neither William late Viſcount of Kenmuir, George "Hume of Whitfield, nor Captain James Dalzell, were entitled "unto the tenements and acres mentioned in the exception, in "their own right, or to their own uſe, or any other perſon in "truſt for them on the 24th of June 1715, or at any time ſince; "and found that the reſpondent was then, and has been ever "ſince, veſted in the right of property of the premiſes."

The appeal was brought from "an interlocutory ſentence or "decree of the Lords of Seſſion, made the 15th of September "1719." Entered, 18 Dec. 1719.

(In this appeal the appellants' caſe only was found; it ſtates ſome of the circumſtances on which the allegation of truſt was founded, but too indiſtinctly to be here detailed.)

Judgment, 18 Jan. 1720-1. After hearing counſel, *It is ordered and adjudged that the ſaid petition and appeal be diſmiſſed, and that the interlocutory ſentence or decree therein complained of be affirmed.*

Caſe 76. The Commiſſioners and Truſtees of the Forfeited Eſtates, - - - *Appellants;*
Sir George Stewart of Balcaſky, Bart. *Reſpondent.*

20 *Jan.* 1720-21.

Fiar — Forfeiture for Treaſon — A crown vaſſal in 1707 ſells and diſpones his eſtate to an onerous purchaſer, with procuratory of reſignation, and other uſual clauſes, and the price is paid: the crown vaſſal in 1715 is attainted for treaſon, and the purchaſer, who had not completed his title by inſtrument, makes reſignation, and takes ſaſine on a charter from the crown: The eſtate was not forfeited by the attainder of the ſeller.

BY an act of parliament 1 Geo. 1. c. 42. intituled "an act for "the attainder of George Earl of Mariſchall and others," John Stewart of Invernytie was attainted of high treaſon. The appellants thereupon cauſed what they deemed to be his eſtate, particularly the lands of Gaſkinhall, and others in the pariſh of Kilſpindy and ſhire of Perth, to ſeized and ſurveyed for the uſe of the publick.

John Stewart of Grantully in purſuance of the act 5 Geo. 1. c. 22. preſented his exceptions to the Court of Seſſion againſt the ſaid ſeizure and ſurvey, ſetting forth, that in May 1707, the ſaid John Stewart of Invernytie by a mutual agreement entered into with John Stewart of Grantully, obliged himſelf to convey the ſaid lands of Gaſkinhall, and others to Grantully, and his heirs, ſubject to the jointure of Invernytie's mother; in conſideration whereof John Stewart of Grantully obliged himſelf to pay at the rate of thirteen years' purchaſe of the rent payable in kind, and eleven years' purchaſe of the rent payable in money: and in purſuance of this agreement, John Stewart of Invernytie, with conſent of Mary his wife, on the 11th of Auguſt 1709, executed a diſpoſition of the premiſes in favour of John Stewart of Grantully, which was judicially ratified by the wife; and the purchaſe money, 30,000*l.* Scots, was paid to the diſponer on the day of executing the diſpoſition, and a receipt granted for the ſame:

That on the 30th of September 1712, Invernytie's mother, for an onerous conſideration, conveyed her jointure iſſuing ont of the premiſes to James Baird, Merchant in Edinburgh; and on the 7th of October 1712, Mr. Baird conveyed the ſame to John Stewart

Stewart of Grantully, who immediately after entered into poſſeſſion of the premiſes and continued therein, and received the rents and profits, till his death: and that Grantully on the procuratory of reſignation contained in the diſpoſition by Invernytie, in his favour, after Invernytie's attainder, obtained a charter from the crown, the ſuperior in February 1718, upon which he was duly *infeft*.

To theſe exceptions the appellants made anſwers that, as Invernytie alone was infeft, at the time of the attainder, the eſtate was thereby forfeited. The Court of Seſſion on the 16th of September 1719, "found that on or before the 24th of June 1715, "the exceptant was in poſſeſſion of the lands and others mentioned in the exceptions, by virtue of a diſpoſition and deed of "conveyance of the property thereof, made and executed before "the 1ſt day of Auguſt 1714, and that in virtue of the ſaid "rights and poſſeſſion, the exceptant has good right to the property of the ſaid lands and others mentioned in the exceptions, "and to the rents, iſſues and profits, ſince the ſaid 24th of June "1715, and in time coming."

The appeal was brought from an interlocutory ſentence or decree of the Lords of Seſſion, of the 16th of September 1719. Entered 21 Dec. 1719.

John Stewart of Grantully, the original reſpondent, having died, the appeal was revived againſt Sir George Stewart, his heir, the now reſpondent.

Heads of the Appellants' Argument.

The Court of Seſſion had no manner of juriſdiction in this caſe (*a*), ſince the attainted perſon was ſo far intereſted in the lands claimed by the reſpondent, that he was the only perſon who ſtood infeft in them as the vaſſal of the crown: a ſecond deed of conveyance to any other perſon, with infeftment taken upon it, would have been preferable to the reſpondent's right, and would have veſted the property in the ſecond diſponee.

The attainted perſon being the proprietor of the lands, the fee became forfeited by his treaſon and attainder, without regard to any perſonal right or diſpoſition upon which no infeftment had followed; and there is no law in Scotland, to ſupport ſuch a perſonal right againſt the effect of a forfeiture. The law has no regard to covenants made between the attainted perſon and any third party, concerning ſuch lands, if ſuch third party have not completed his right before the treaſon or attainder: and if in any caſe a purchaſer ſuffer, it is by his own neglect, ſince when he made a purchaſe, he ought to take care to complete his right in a legal way.

The reſpondent alſo inſiſted upon the act 1 Geo. c. 20. "for "encouraging all ſuperiors," &c., by which the rights of lawful creditors are ſalved; and upon the act appointing commiſſioners

(*a*) See the caſe, Commiſſioners of Forfeitures v. Drummond, No. 64 of this Collection for an explanation of this argument. It is obvious, however, that the Court had juriſdiction in this caſe.

to inquire of the eſtates of certain traitors, by a clauſe in which, diſpoſitions made even after the 24th of June 1715 are declared to be as good in law, as if they had been granted before that day, the valuable conſideration being proved otherwiſe than by the narrative of the deed. But when he puts his caſe upon theſe acts, he muſt admit that the Court of Seſſion had no juriſdiction, becauſe theſe acts and clauſes of them made uſe of by the reſpondent, do all concern claims that were to be tried before the appellants, to or upon lands, where the legal eſtate was veſted in the forfeiting perſon. The act firſt mentioned hath relation only to creditors for payment of juſt debts, which is not at all the reſpondent's caſe. Although the other act does declare diſpoſitions made after the 24th of June 1715, to be as good in law as if they had been executed before that time, it determines nothing as to the import or effect of diſpoſitions without ſaſine, which were executed before that day, but leaves them to the ſame effect they would have had, if this act had not been made; and therefore if before this law a diſpoſition without infeftment could not be ſet up in bar of a forfeiture this act makes no alteration of the former law.

Heads of the Reſpondent's Argument.

It muſt at firſt ſight appear inconſiſtent with every known principle of law and equity, that a purchaſer for an onerous conſideration, or in poſſeſſion of an eſtate purchaſed for about ten or twelve years, and receiving the rents and profits during that time ſhould forfeit that very eſtate by the attainder of the vendor ſo many years after the ſale.

Though a ſubſequent diſpoſition for a valuable conſideration without notice, with infeftment recorded before that to the reſpondent, might be preferred to his, yet ſuch preference can only be given to ſuch purchaſer, who firſt recorded his infeftment. But the grantor was nevertheleſs legally diveſted by the firſt conveyance; and the ſecond conveyance, though good to the purchaſer without notice, would be a wrongful act in the grantor, for which he might be puniſhable criminally, and any other eſtate he might have would be liable to make ſatisfaction to the firſt purchaſer. As to the grantor, therefore, the deed, under which the reſpondent claims, diveſted him of the property, and the reſpondent might at any time, without any further conveyance or authority from the grantor have had infeftment, and has now actually obtained ſuch infeftment, without any other right from the grantor; nor has the grantor made any ſubſequent conveyance to give occaſion for any competition.

If the grantor were not wholly diveſted, yet by the act of parliament 1690, c. 33. "for ſecurity of creditors, vaſſals, and heirs "of entail of perſons forfeited," it is expreſsly enacted, that all eſtates forfeited ſhall be ſubject to all real actions and claims againſt the ſame; and by this act the reſpondent's caſe would be within the proviſions of that act, ſince his is a real claim upon, rather of, an eſtate.

By

By a clauſe in the act "for appointing commiſſioners to inquire," &c. all conveyances made by the forfeiting perſon, even after the 24th of June 1715, are declared to be good, if the onerous conſideration be proved; much more ought this which was made in 1707, and the price admitted by the appellants to have been paid. As this act has provided for every demand in equity as well as in law, though it ſhould, for argument's ſake, be admitted, that the property of the eſtate was not abſolutely or finally veſted in the reſpondent, yet certainly in equity he had the only title to it, and the grantor had no title in equity, nor could he forfeit any equitable intereſt, which was not in him, but in the reſpondent.

After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the interlocutory ſentence or decree therein complained of be affirmed.* Judgment, 20 Jan. 1720-21.

For Appellants, *Ro. Dundas.* *John Willes.*
For Reſpondent, *C. Talbot.* *Will. Hamilton.*

The Commiſſioners and Truſtees of the Forfeited Eſtates, - - - *Appellants*; Caſe 77.
Sir George Stewart of Balcaſky, Bart. *Reſpondent.*

23d *Jan.* 1720 21.

Fiar.—Forfeiture for Treaſon.

ANOTHER queſtion of the ſame nature as in the laſt appeal, aroſe between the ſame parties, in regard to the lands of Waterſtown. The titles of the reſpondent to theſe lands ſtood in the ſame ſituation, as his titles to the lands of Gaſkinhall. No caſes have been found on the preſent appeal. That the queſtions were the ſame in this and the laſt appeal, appears from the report of the Engliſh Judges on the point of juriſdiction in the Court of Seſſion, (Journal, 11 March 1719-20,) which they left undecided.

The judgment of the Court of Seſſion, in favour of the reſpondent's predeceſſor, was pronounced on the 10th of September 1719.

The appeal was brought "from an interlocutory ſentence or "decree of the Lords of Seſſion, of the 10th of September 1719." Entered, 21 Dec. 1719.

After hearing counſel, *It is ordered and adjudged that the ſaid petition and appeal be diſmiſſed, and that the interlocutory ſentence or decree therein complained of be affirmed.* Judgment, 23 Jan. 1720-21.

Caſe 78. Fountain-hall, 19 Dec. 1701. Forbes, 25 July and 22 Nov. 1705.

William Hamilton, of Grange, Eſq; - *Appe*
George Boſwell Eſq; - - - *Reſp*

3d *Feb.* 1720-21.

Minority and Leſion.—Jus Mariti.—Courteſy.—A minor wife, wh was major, is reponed on the head of Minority and Leſion, ag deeds executed by her, with conſent of her huſband: but ſuch the major huſband excluded h s jus mariti and courteſy, though extend to enforce a warrandice of the deeds executed by the wif he was ſpecially bound.

AFTER the determination of the former appeal, (N this Collection,) whereby it was found, that the inf of the appellant's wife not being quarrelled in her lifetin ſufficient to ſupport the courteſy of the huſband; the a brought a freſh appeal againſt ſundry of the early inte pronounced in the cauſe by him and his wife, in her l againſt the reſpondent. On the 19th of December 17 Court "found that Margaret Boſwell, the appellant's wi "minor when ſhe ſubſcribed her contract of marriage a "writs craved to be reduced, ſhe ought to be reponed "the ſame upon enorm leſion; and ordained parties pro "to be further heard if the ſaid Margaret Boſwell was "leſed by ſubſcribing the writs aforeſaid; but found "appellant being major, and not having proved concuſſi "the qualities alleged by him were not relevant t "contravention to repone him againſt the deeds ſubſcribe "before and after the marriage, and therefore aſſoilzied the "dent from the reduction at the appellant's inſtance:" this interlocutor the Court adhered on the 23d of Febru 22d of June 1703: And on the 1ſt of July 1703, th "repelled the nullity, that the father being curator to his "ter could not take a diſcharge to himſelf from his daug "her contract of marriage of her curator's accounts; "mitted to the Lord Ordinary to take inſpection of the a "produced, and inſtructions thereof, for inferring or li "from enorm leſion, and to hear parties procurators "upon."

Counſel being heard on the ſaid accounts, and a repo to the Court, their lordſhips, on the 27th of the ſaid m July, "found ſufficient inſtruction of enorm leſion to "the appellant's wife againſt the contract of marria "deeds following thereupon, and to oblige the reſpon "count and reckon:" to which the Court adhered on t of November thereafter. After an account taken, the on the 25th of July 1705, "found that the annual rent "principal ſums, and the rents of the acres and others be "to the appellant's wife, muſt enter into compute for de

g whether ſhe was enormly leſed by her contract of mar-
age; and found that ſhe was enormly leſed; and that the
ſpondent was not liable to account for the ſaid annual rents
id rents, in reſpect they were diſcharged by the appellant,
ie huſband, who was major."

fter further proceedings in the count and reckoning, and the
ondent having got credit for the ſum of 6000 merks, given
marriage portion to his daughter, the Court, on the 16th
January 1708, "found that the reſpondent had in his hands,
t the time of the marriage, of by-gone rents and annual
ents, the ſum of 509*l.* 10*s.* Scots, over and above all his de-
urſements, for aliment, expences of plea, and other expences,
nd annual rent thereof, expences of the wedding and wedding
loaths, public burdens, reparations, and others, depurſed by
im for his daughter preceding the marriage."

he appellant and his wife afterwards applied by petition to
Court, ſtating, that as it appeared, that inſtead of the daugh-
being indebted to the father at the time of the marriage, as
pretended, he was in her debt 509*l.* 10*s.* Scots, ſo he had
ſum as a reward to engage him to take her eſtate; and they
efore prayed, that they might be relieved againſt this tranſ-
on as being ſo much impoſed upon: But the Court, on the
of July 1706, "aſſoilzied the reſpondent from the reduction
it the appellant's inſtance, in ſo far as concerned his jus mariti et
courteſy, but declared the obligement or burden taken by the
appellant to cauſe his wife to make good the diſpoſition under
a certain penalty, to be void as to the appellant's wife and her
heirs, and reduced in ſo far." And on the 31ſt of the ſaid
nth their lordſhips "reponed and reſtored the appellant's wife
againſt the ſeveral deeds executed by her at the time of her
marriage, and reduced the ſame as to her intereſt." And on
22d of July 1707, the Court "refuſed to reduce the appel-
lant, or reduce the deeds as to him."

The appeal was brought from "part of two interlocutors [illegible]
tences or decrees of the Lords of Seſſion of the [illegible] of
cember 1701, and 25th July 1705, and the ſeveral acts [illegible]
hereof."

Heads of the Appellant's Argument.

The ſaid Margaret, the wife, was a minor when ſhe [illegible]
ſe deeds; ſhe had at that time guardians or curators, and [illegible]
ds being executed without their conſent, were [illegible] of
re not only deeds without their conſent, but really [illegible] by
ir own favour, ſince they diſcharge the curators of [illegible] the
eipts, upon the recital of an account given, when [illegible] m is
ſuch thing. If theſe deeds were laid upon this [illegible] is re-
joint obligation of the appellant and ſhe; for a [illegible]
n can have no acceſſion, as the appellant's [illegible]
ly acceſſary to the wife's. prin-
It is certain there was no purchaſe, for the [illegible] ience,
ſtead of letting his daughter have the [illegible] Scots.
In

wholly misrepresented them. Though the estate which descer to her from her mother was said to be encumbered, yet it app it was quite otherwise; and though the respondent alleged his daughter was in his debt, it was proved that he was indel to her. And the time when these representations were used a considerably to the fraud; after he had proposed the appellan a proper husband for her, after their affections were mutu engaged, then, and not till then, did he trump up the false count of her circumstances. To tell them then that there sho be no marriage without giving in to the terms proposed by h shews, to a demonstration, the intention of a fraud. Tha even still made more plain from the inducement he made use to persuade the appellant and his daughter to agree to these m sures, which was the promise of a fortune of 6000 merks, whi as he said, was altogether voluntary, when in fact the 6(merks were her own money, and instead of giving her a thing, he retained the interest of 2000 merks of her own mo during life.

If the transaction in regard to the wife was fraudulent, as Lords have determined it to be, it must be so in relation to husband, he being imposed upon and drawn in by the same a representations; and the reason given for the distinction, that the husband was major, seems to be of the most danger consequence: Upon that way of reasoning, no man of full is to be relieved against fraud. A minor is to be relieved on count of nonage, even though the bargain be not fraudule but wherever fraud is an ingredient, whoever is thus fraudulen circumvented, without regard to his age, is to be relieved. T is the proper business of a Court of Equity, as the Court Session certainly is.

If the appellant was not to be relieved because of age, he could he be relieved against his obligement, that his wife shou ratify these deeds when of age, under a penalty equal to value of the estate? Was not he as much of age, when t obligation was entered into, as when the conveyance executed? And as they were in the same deed, why should be relieved against one and not against the other, since the rea is the same in both.

Heads of the Respondent's Argument.

The respondent claimed the appellant's life-rent estate upon same title and conveyance which is now quarrelled; and Court of Session absolved him from the appellant's action brou in order to remove him from the possession of that life-r estate; which was directly and plainly decreeing the estate belong to the respondent in virtue of this conveyance. T decree was affirmed by the House of Lords; and if the appell did not think fit to insist upon the objection he now mal against the conveyance, he has himself to blame; but the tr is, he was conscious to himself, and was advised, that the jection was of no force.

Th

here is no evidence of the leaſt unfair dealing in the whole ſaction; the reſpondent repreſented the circumſtances of the e according to the beſt of his knowledge and belief: if the llant was not ſatisfied with theſe accounts, he was at freedom ave inquired more narrowly, which if he neglected, he has ſelf to blame, but that can be no ground for avoiding the ſaction.

: was optional to the reſpondent to conſent to his daughter's riage with the appellant or not, as he thought fit, and upon terms as he judged reaſonable, conſidering his own circumces; and if it was true that the appellant would not conſent he marriage, and give the tocher with his daughter, that he ally gave her, without the appellant's quitting and making any claim he might have had to the life-rent of the daughe eſtate, there was no fraud in this, but a fair tranſaction. appellant himſelf, in a petition given in to the Court in the e of his wife, does acknowledge in ſo many words, that he ier did allege nor prove any concuſſion or force uſed againſt , though he had alleged and proved concuſſion uſed againſt wife.

fter hearing counſel, *It is ordered and adjudged, that the* Judgment, 3 Feb. 1720-21.
on and appeal be diſmiſſed, and that ſuch part of the interlocutory nces or decrees, and the affirmances thereof as are therein comed of, be affirmed.

For Appellants, *Rob. Raymond. Will. Hamilton.*
For Reſpondent, *Ro. Dundas. Tho. Bootle.*

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he actions between theſe parties appear to have laſted upls of 20 years.

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n Paterſon, eldeſt Son and Executor of ohn Archbiſhop of Glaſgow, deceaſed, *Appellant*; Commiſſioners and Truſtees of the orfeited Eſtates, - - - *Reſpondents.* Caſe 79.

20th *March* 1720-1.

Forfeiture for Treaſon.—1 *Geo.* 1. *c.* 20.—*Perſonal debt claimed on a forfeited Eſtate.*—The acts relative to forfeiture for treaſon having ſalved the rights of creditors innocent, dutiful, and loyal; a claim on a forfeited eſtate, by virtue of a perſonal bond, (which had been given up in the inventory by the claimant when confirmed to his father) is made by a perſon who had been confined in priſon upon ſuſpicion, but liberated without trial; this claim is rejected by the truſtees and Court of Delegates, but their judgment is reverſed.

February 1681 Charles Earl of Marr, deceaſed, as a prinpal, and George Earl of Panmure deceaſed, as cautioner, ted a bond to the appellant's father for 2000 merks Scots.

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In September 1700, James late Earl of Panmure, attainted, executed a bond of corroboration of the former, obliging himself to pay the sum therein contained to the appellant's father, with interest from that date.

After the archbishop's death, the appellant was confirmed his executor, and exhibited an inventory of all his effects, wherein, inter alia, was mentioned the bonds in question, their dates, and the interest then in arrear; and this inventory was recorded in the commissary court-books, where the testament was confirmed.

John late Earl of Marr, son and heir to the said Earl Charles, and the said James late Earl of Panmure being by act of parliament attainted of high treason, the appellant, in pursuance of the act
1 G. 1. c. 50. 1 G. 1. c. 50. intituled, "*An act for appointing commissioners to*
4 G. 1. c. 8. "*inquire*," &c. and of the act 4 G. 1. c. 8. intituled, "*An act*
"*for vesting the forfeited estates in trustees to be sold for the use of*
"*the publick*," entered his claim before the respondents upon the said bonds, to obtain satisfaction of the said sum of 2000 merks, with the interest thereon then in arrear, out of the estates of the said attainted earls of Marr and Panmure.

After hearing counsel for the appellant, and consideration of memorials in writing given in on both sides, the respondents, on the 31st of August 1719, pronounced judgment, by which they found, "that the foundation of the claim being a personal bond, "not upon record before the attainder of the debtor attainted, "the claimant has no right to the principal sum and interest "claimed, either by the laws of Scotland before the Union of "Great Britain or since, unless he had continued in peaceable "and dutiful allegiance to his majesty during the late unnatural "rebellion: and therefore that the claimant, before his claim "can be affirmed, ought to produce testimonials either from "justices of the peace, or deputy lieutenants of the county where "he resided, or from other persons of credit in his neighbour-"hood, bearing that to the best of their knowledge and informa-"tion the claimant had continued dutiful and loyal to his ma-"jesty during the said rebellion. And the claimant having "insisted by his counsel that he ought to be presumed innocent, "and the commissioners and trustees having further considered of "the said memorial relative thereto, are also of opinion, *primo*, "that the bond, on which the claim is founded, not having been "recorded before the treason and attainder of the debtor, it is
1690, c. 33. "not saved even by the act of parliament 1690; and that it can-"not be binding against the public, (notwithstanding of its having "been confirmed in a testament prior to the said attainder,) in "respect that such confirmation, being only to establish a title of "succession, could give it no force, nor be the foundation of any "diligence or execution against the debtor, without the said "bond's being entered in the proper record, and its being other-"wise valid in law. *Secundo*, That whatever was the extent of "the said act 1690, as to saving of personal debts from being "extinguished by the attainder of debtors, yet that the said actions "from whence a want of duty and loyalty might be inferred,

cannot

"cannot be preſumed, But muſt be proved by a regular and legal "trial; are of opinion that a preſumptive evidence of duty and "loyalty, founded on teſtimonials, ſuch as are above mentioned, "may eaſily be obtained without any trouble or proof of parti-"cular actions by all who, according to the moſt favourable "opinion, or the moſt extenſive charity, are to be reckoned to "have continued dutiful and loyal: and that the criminal actions, "becauſe the weight of the puniſhment which attends the proof "of them, as to criminal and penal effects, require a very ſtrict "and regular proof by a jury of peers before they can have any "penal effect; yet as to a civil effect they may and ought to be "preſumed, where teſtimonials (ſo eaſily obtained by the really "innocent) cannot be obtained; eſpecially in a caſe where there "is ſo great notoriety, as is in that of the claimant, it conſiſting "with the knowlede of many thouſands that the claimant was "taken priſoner at Preſton with the others then in rebellion, and "was carried to London, where he lay in priſon till by the cle-"mency of the government he was delivered from the puniſh-"ment of rebellion and treaſon. Upon all which the ſaid com-"miſſioners and truſtees do find, that the claimant is not entitled "to the benefit of the act for encouraging all ſuperiors, vaſſals, "&c. and do therefore diſallow of the ſaid claim; and the ſame "is by this Court diſmiſſed accordingly."

Againſt this decree of the reſpondents the appellant prefented his appeal to the Court of Delegates (*a*) eſtabliſhed in Scotland; the Lord Advocate made anſwers to it; and after a hearing of the cauſe, and conſidering memorials for both parties, the Court of Delegates, on the 20th of December 1720, by a majority of one, "ordered and adjudged, that the decree complained of be affirmed, "and the ſaid appeal diſmiſſed."

The appeal was brought from "a decree of diſmiſſion of the "31ſt of Auguſt 1719, made by the commiſſioners and truſtees "of the forfeited eſtates, of the appellant's claim, put in before "them, and an affirmance thereof by the Lords Delegates in "Scotland the 20th of December 1720." Entered, 19 Jan. 1726-7.

Heads of the Appellant's Argument.

As every man ought to ſuffer for his own fault, ſo it is the higheſt juſtice, that no creditor ſhould ſuffer by the rebellion of his debtor, nor any thing be forfeited to the Crown but what the forfeiting perſon had *deductis debitis*; and therefore the appellant's claim being for a debt admitted to be juſt, it ought to have been ſuſtained, and the ſame decreed to be paid out of the eſtate of the debtors, which are admitted to be much more than ſufficient to ſatisfy the debts upon the ſame.

This rule ſeems more agreeable to the law of Scotland, by which all eſtates deſcending to an heir are ſubject to the payment of all

(*a*) This Court of Delegates was appointed by the act of parliament 4 G. 1. c. 8 to hear appeals taken to judgments of the commiſſioners for forfeitures. They conſiſted of five of the Judges in Scotland appointed by his majeſty.

debts,

debts, even thoſe by ſimple contract; and there ſeems to be the ſame reaſon, that the eſtates ſhould be equally ſubjected to debts in the hands of the Crown.

1690, c. 33. It is expreſsly enacted, by the act 1690, c. 33. that forfeited eſtates ſhall be ſubject to all debts whether real or perſonal. The words are, "*That all eſtates forfeited ſhall be ſubject to all real "actions and claims againſt the ſame to all true and lawful creditors, "whether perſonal or real.*" This certainly comprehends the appellant's caſe. It is true, in one part of the act are theſe words, "*ſo as the debts be upon record, or diligence done thereupon;*" but as that exception or proviſo is not in that part of the act where the forfeited eſtates are ſubjected to all debts in general, and where its proper place was, if any ſuch reſtriction had been intended, ſo the words inſiſted on are inſerted in a place where no mention is made of *debts*, but *leaſes* to tenants, and before any thing is mentioned with reſpect to creditors, and the judges have always ſo conſtrued this act, and never thought recording neceſſary.

But if recording were neceſſary, that part of the law is ſufficiently anſwered by the claims being upon record in the Commiſſary Court, and the intention of the law was ſufficiently attained; becauſe it can have no other view than to avoid fraudulent demands. Now the record of this debt does as ſufficiently anſwer that, as if the bond had been regiſtered.

The act of the firſt of the king, *for encouraging all ſuperiors, vaſſals*, &c. enacts, "That no conviction or attainder ſhall exclude the right or diligence of any creditor remaining peaceable and dutiful for ſecurity or payment of any true, juſt, and lawful debt contracted before the commiſſion of the crime." The appellant's debt is entirely within this deſcription, and ſo far appears to be a true debt, that it is contracted, not between the forfeiting perſons and the appellant, but between the fathers of the forfeiting perſons and the appellant's father; it is not diſputed but the debt is ſtill owing, and no part of it paid.

Nor will it alter the caſe, that the reſpondents pretend, that the appellant does not come under the deſcription of this act, in regard he was not peaceable and dutiful, becauſe nothing of that is proved, nor any attempt made to prove it: a crime is never to be preſumed; but innocence is, till the contrary be proved.

The caſe of the appellant and other creditors is ſtill more ſupported from the diſtinction made by the legiſlature itſelf between the caſes of ſuperiors and creditors; in the firſt, they have in very diſtinct lines ſet forth the deſcription and character of ſuch as were to have the benefit of the privileges introduced in favour of ſuperiors, vaſſals, and tenants, in theſe words: "provided always, "that none of his majeſty's ſubjects, whether ſuperior, or vaſſal, "or tenant, ſhall have the benefit of this act, excepting ſuch who "being lawfully called out or required to join with his majeſty's "hoſt, in oppoſition to the ſaid Pretender or his adherents, ſhall "do the ſame, or who (not being ſo called out or required) ſhall "continue peaceable and dutiful to his majeſty." Thus the law having

wing introduced a reward, and (which was purely ſuch in fa-
ur of ſuperiors) very reaſonably excluded ſuch as did not fall
ithin the particular deſcription; but they have made no ſuch
rticular proviſion in the caſe of creditors, where they were
oing juſtice rather than a favour. Nor can it be expected, that
he appellant ſhould bring any proof of his not having acted un-
utifully or unpeaceably, nor is it poſſible for him to prove it,
nleſs he could bring evidence of every action of his life, during
he whole courſe of the late unnatural rebellion.

It has ſtill been looked upon as a hardſhip to inflict the leaſt
enſure or ſuſpicion on bare ſuggeſtion; but harder muſt be the
ate of the appellant to be involved in the forfeiture of his debtors,
nd be deprived of his juſt debt, for no other reaſon but becauſe
e did not adduce a proof that every moment of the rebellion he
as in the practice of ſuch duties as are incumbent upon a dutiful
ubject, which is not only impoſſible, but has hitherto been
hought unneceſſary, ſince innocence and dutiful behaviour
re always preſumed. If this doctrine be eſtabliſhed, that every
ubject muſt be preſumed to be diſaffected, if he cannot by un-
oubted vouchers ſhew the contrary, it is too obvious how fatal
he conſequence may be.

Heads of the Reſpondents' Argument.

According to the plain words of the proviſo in the act 1690, o debt can be ſet up againſt the forfeiture, or charged upon the ſtate forfeited, but ſuch as is *recorded by being regiſtrate, or diligence done upon it*, that is, ſuit or proceſs carried on againſt the debtor or his eſtate; neither of which was done in the appellant's caſe. And the mentioning the debt in a liſt of the deceaſt's debts at the time of confirming his teſtament is no regiſtration of the debt, ſince the obligations themſelves were not ſo much as produced in thoſe caſes; indeed, the executor commonly not maſter of them, he gives up in the liſt whatever he ſuſpects may be owing, ſometimes debts that never were in being, and equently debts that are extinguiſhed or ſatisfied by payment.

If the appellant could have any benefit from this act, it would ally ſave his claim as to the capital ſum, but not as to bygone tereſts, feu-duties, and all other annual preſtations, which are xpreſsly excepted in the act, and declared not to affect the eſtates orfeited.

This act, 1690, being made only in favour of *creditors innocent nd dutiful*, the appellant can have no benefit by it, who *himſelf* as in the *rebellion*.

But this act is not now the rule for judging in queſtions of this 7 Ann. c. 21.
ind, after the act 7 Ann. c. 21., intituled, "Act for improving "the Union of the two Kingdoms;" by which the laws of Engand in relation to treaſon, in ſo far as may concern the nature of he crime, the form of trial, and the puniſhment, are extended to cotland; and perſons committing treaſon in Scotland are delared ſubject to the ſame pains, penalties, and forfeitures, that

perſons committing treaſon in England are ſubject to. Fro whence it muſt follow, that as eſtates in England are forfeited the Crown, without being charged with debts merely perſon eſtates in Scotland muſt be forfeited in the ſame manner.

1 Geo. 1. c. 20. The act 1 Geo. c. 20., *for encouraging all ſuperiors, vaſſals,* & ſeems likewiſe to make a material alteration in the ſaid act 16 (if that act 1690 can be underſtood as the appellant explains i for this act 1 G. c. 20. provides only for the ſecurity of credit remaining *peaceable* and *dutiful*, which ſuppoſes that a credi not remaining peaceable and dutiful can have no claim of debt o of a forfeited eſtate.

The appellant contended, that he muſt be preſumed to be i nocent, and that the lapſe of three years, and the act of grace c bar all probation of guilt. But ſince the appellant claims t benefit of acts of parliament introducing privileges to pe ſons peaceable and dutiful, contrary to the ſtrict nature of fo feitures, and beyond what was competent by anterior laws, h muſt bring himſelf under the deſcription and intent of thoſe act by giving ſome evidence of his remaining peaceable and dutifu The lapſe of three years, and the act of grace free him only fro the puniſhment of his own treaſon; they do not put him in th condition of a man who was never criminal; nor can they b conſtrued ſo as to afford him any privilege, thereby to hurt th public, and leſſen the effects of the forfeiture of the late Earls o Marr and Panmuire.

The appellant entered his claim, and was by law obliged to d it, both before the act of grace and the lapſe of the three years but he was at that time incapable of entering any ſuch claim, no having remained peaceable and dutiful; and if the claim was be at the time of entering it, and at the time theſe forfeited eſtate were veſted in the reſpondents for the uſe of the public, it is t be conſidered as if no claim had been entered at all: and a after-act of grace or lapſe of three years can give life to a clai which was dead and uſeleſs at the time it was entered, and th eſtates ſo veſted in the reſpondents.

Judgment, 20 March 1720-1. After hearing counſel, *It is ordered and adjudged, that the decr of diſmiſſion complained of in the ſaid appeal be reverſed, and it is furth ordered, that the appellant ſhall have a ſatisfaction for the princi ſum and intereſt due upon the bonds in queſtion out of the forfei eſtates in queſtion.*

For Appellant, *C. Talbot, Will. Hamilton.*
For Reſpondents, *Ro. Dundas. Richard Weſt.*

On the printed Caſes, from which this report was taken, it ſtated in manuſcript that a diviſion of the Houſe took place up this judgment, the numbers being 21 to 11.

Simon Lord Lovat, - - - *Appellant*, Caſe 80.

Emilia Lady Dowager of Lovat, Alexander Mackenzie of Garloch, an Infant, by his Guardians, and others (ſtiling themſelves) real Creditors upon the Eſtate of Lovat, and Hugh Mackenzie and Patrick Robertſon, Factors appointed upon the ſaid Eſtate, - - - - - - *Reſpondents.*

1ſt *April* 1721.

Real and Perſonal.—A diſpoſition is made of an eſtate to one perſon in life-rent, and to others in fee, with the burden of payment of the grantor's debts: in a competition between the grantee of the life-rent eſcheat of the life renter, and the debtors of the grantor of the diſpoſition, the Court found that their debts were *real*, and did affect the eſtate; but their judgment is reverſed.

A grantor of a deed declares, that if children's portions are not paid in his lifetime, perſons whom he names may appoint a factor, after his death, to receive certain rents, and pay theſe portions: theſe portions were real debts affecting the eſtate.

Sequeſtration.—Obtained irregularly is ſet aſide.

Preſumption.—Marriage proviſions preſumed to be compenſated by the grant of and accepting a poſterior proviſion.

Children's proviſions not claimed till after a forfeiture, and the lapſe of ſeveral years after a locality might have been made effectual to pay them, were not preſumed to be paid; an affirmance.

BY the deciſion in the former appeal, (No. 53. of this Collection) the appellant was confirmed in his right as grantee of the life-rent eſcheat of Alexander Mackenzie of Fraſerdale, the attainted perſon; and it was ordered and adjudged, "that the "rents of the eſtate in queſtion ſhould be paid to the appellant "according to his grant; but that ſuch debts of the ſaid Alexander Mackenzie as were real, and did by the law of Scotland "affect the ſaid eſtate, at the time of the forfeiture of the life-"rent eſcheat ſhould be charged on the ſaid eſtate in due courſe "of law." It now became a queſtion between the appellant and reſpondents whether certain debts claimed by them were real or not, or whether they did affect the ſaid eſtate. Theſe queſtions took their riſe from the following circumſtances.

By contract of marriage in 1690, between Hugh Lord Lovat deceaſed, and the reſpondent Lady Emilia, daughter of the late Marquis of Athol, the ſaid Hugh Lord Lovat, in conſideration of the then intended marriage, obliged himſelf to ſettle upon Lady Emilia as a jointure, ſeveral lands therein particularly mentioned, of the value of 4000 merks Scots *per annum*, and likewiſe an annuity of 2000 merks *per annum*, charged upon the lordſhip of Lovat, and lands of Stratherrick and Abertarf; and accordingly, purſuant thereto, a charter was obtained from the crown, and Lady Emilia was infeft in the premiſes in May 1694.

In September 1696, Hugh Lord Lovat executed a bond of proviſion to his daughters the Honourable Ann, Catherine, and Margaret Fraſer, three of the preſent reſpondents, for 10,000 merks Scots, payable to each of them at their age of 16 or marriage: and this bond was regiſtered in October 1700.

The eſtate of Lovat being very much incumbered and adjudications led thereon prior to ſaid marriage-ſettlement, the greateſt part of theſe adjudications were purchaſed in by Roderick Mackenzie of Preſtonhall, one of the Senators of the College of Juſtice, whoſe ſon Alexander Mackenzie, the attainted perſon, married Emilia, ſome time ſtiled Baroneſs of Lovat, eldeſt daughter of the ſaid Hugh Lord Lovat. In 1706, Lord Preſtonhall, obtained a charter of adjudication from the crown of the eſtate of Lovat, upon which he was duly infeft; and he afterwards executed a deed granting to the ſaid Alexander Mackenzie and his wife 4000 merks per annum charged upon the ſaid eſtate; and he alſo executed an entail thereof, to Alexander Mackenzie in life-rent, whom failing to Hugh ſtiled maſter of Lovat his ſon, and the heirs male of his body, whom failing to certain other heirs therein mentioned. This deed of entail when reciting the particular lands out of which the reſpondent, the Dowager Lady Emilia's jointure of 4000 merks was ſecured, expreſsly mentioned that the ſame ſhould continue a burden upon theſe lands; but it took no notice of the annuity of 2000 merks before mentioned, which had been alſo provided to her by her marriage contract, and charter and ſaſine thereon. The deed likewiſe provided "that the ſaid Alexander Mackenzie, "his life-rent, over and above the ſaid 4000 merks provided to "him and his lady in life-rent, and the other heirs their fee "ſhould be affected and ſtand burdened with the payment of all "the lawful debts, and to the performance of all the deeds that "the ſaid Roderick Mackenzie ſhould happen to be bound in, or "obliged to perform at the time of his deceaſe by bond, or any "other manner of way whatſoever: and that in caſe the daughters of the ſaid Hugh Lord Lovat deceaſed, were not ſatisfied "and paid their portions in the life-time of the ſaid Roderick "Mackenzie, that it ſhould be in the power of the perſons therein "named to appoint a factor or receiver of the rents of the lands "of Straatherrick and Abertarf within one year after the grantor's "death, and to apply the rents of the ſaid lands to the payment "of their fortunes." In terms of this entail a charter was obtained from the crown, upon which infeftment was duly taken. Lord Preſtonhall died in 1708.

In February 1717 the father of the reſpondent Alexander Mackenzie the infant, to whom Lord Preſtonhall was indebted by bond, obtained a decree of declarator and adjudication (after the dates of the forfeiture and gift of life-rent eſcheat,) declaring the life-rent of Alexander Mackenzie the forfeiting perſon, and the fee of Hugh (ſtiled) Maſter of Lovat, and the lands themſelves ſubject to the payment of what was due on ſaid bond, amounting to 6132*l.* Scots.

The

The reſpondent Lady Emilia, and other creditors likewiſe brought their ſeveral actions before the Court of Seſſion, to have their demands aſcertained, and to have the rents of the ſaid eſtate applied in ſatisfaction of their debts, as real charges on the eſtate. The perſons, too, authorized by the deed of entail 1706, to appoint a factor upon the lands of Stratherrick and Abertarf for payment of the ſaid young ladies' fortunes, named a factor accordingly; and the ſaid ladies and their factor likewiſe brought their action to be preferred to the rents of theſe lands. And the reſpondent the infant, brought an action of mails and duties in virtue of the ſaid adjudication. To theſe actions the appellant made defences, and inſiſted, that the clauſe in the entail did not make the debts of Lord Preſtonhall, real charges upon the eſtate; that, as to the reſpondent, the dowager's, claim of 2000 merks, it was included in her jointure of 4000 merks ſpecified in the entail, at leaſt ſo it was to be preſumed, ſince in that deed notice is only taken of the 4000 merks; that it was to be preſumed that the fortunes of the reſpondents, the daughters, were paid, but if they were not, they could not be looked upon as a real charge, there being nothing in the deed declaring them to affect the lands themſelves, but only a locality granted for payment of the portions, and that the reſpondent, Alexander Mackenzie's debt, being very old, was preſumed to be paid.

The Lord Ordinary on the 25th of January 1718, "found "that the ſaid Lord Preſtonhall, having conveyed his eſtate "to Mr. Mackenzie, the forfeiting perſon, with the bur"den of his debts, and the ſaid burden being repeated both "in the procuratory of reſignation, and precept of ſaſine, and alſo "repeated in the infeftment following thereupon, the ſaid Lord "Preſtonhall's debts are real, and preferable to the debts and "deeds of Mr. Mackenzie; and that the reſpondent, Alexander "Mackenzie, was creditor to Lord Preſtonhall, by virtue of the "inſtructions in proceſs before the date of the entail, and there"fore preferred him to the appellant the grantee, his tutor de"poning upon the verity of the debt: and likewiſe preferred "the factor appointed for the lands of Stratherrick and Aber"tarf, according to the ſaid deed of ſettlement, until the reſpon"dents, the daughters, ſhould be paid and ſatisfied their ſaid for"tunes and intereſt thereof according to the ſaid entail; and "likewiſe found the reſpondent, the lady dowager, was provided "with an annuity of 2000 merks per annum, out of the lordſhip "of Lovat and other lands, and therefore preferred her likewiſe "for her ſaid annuity."

And after a repreſentation and anſwers, the Lord Ordinary, on the 15th of February 1718, "adhered to his former interlocutor, "finding theſe debts real burdens, preferable to Mr. Mackenzie, "the forfeiting perſon, and ſo that they muſt exclude the grantee "of his eſcheat; and found it relevant, if it be inſiſted upon, "that the portions of the late Lord Lovat's children are ſatisfied in "haill or in part; as alſo that the lady dowager's laſt proviſion is "in ſatisfaction of her former by her contract of marriage; but

" repelled the allegation, that either the portions are to be pr
" ſumed to be paid, or that the lady muſt be preſumed to ha
" accepted the ſecond proviſion in full ſatisfaction of the form
" as no ways relevant preſumptions, without ſome further pr
" bation."

The appellant reclaimed againſt theſe interlocutors to t whole Court, and their Lordſhips by ſeveral interlocutors, on t 28th of February 1718, the 23d of June, the 3d and 14th July, and 24th of December 1719, confirmed the foreſaid int locutors of the Lord Ordinary.

Previous to the former appeal, the creditors of the forfeiti perſon, who were then litigating with the appellant, arreſted t rents of the eſtate in the hands of the tenants; and in the mul ple poinding ſubſequent thereto, the rents were found ſubject the debts and diligences of theſe creditors, preferable to the appe lant, and a factor was appointed to receive the ſame. After th order on the ſaid appeal had been ſerved, the appellant preſente a bill of ſuſpenſion in the name of the tenants, upon the groun of his appeal, and all execution was accordingly ſtayed there Pending the action with the preſent reſpondents, they, in Ju 1719, preſented a petition to the Court praying leave to diſcu the reaſons of ſuſpenſion of the ſaid bill, (which had been give in againſt the then factor in another cauſe); and that in th mean time the ſaid eſtate might be ſequeſtrated, and a new fa tor appointed to receive the rents.

On the 27th of June 1719, the Court " remitted to the Lo " Ordinary, before whom the aforeſaid bill of ſuſpenſion was pr " ſented, to diſcuſs the reaſons ſummarily on the bill, but ordere " the appellant to anſwer the ſaid petition as to the ſequeſtratio " againſt Tueſday then next." But no anſwer having bee given in, the Court, on the 30th of June 1719, " remitted t " the Lord Ordinary to ſequeſtrate the eſtate, and to name a fac " tor to receive the rents." On the 18th of July thereafter, th Lord Ordinary ſequeſtrated the eſtate, and named Mr. Williar Fraſer, factor thereon.

The appellant reclaimed againſt theſe interlocutors, prayin that they might be ſet aſide, and the ſequeſtration recalled, an amongſt other things inſiſted, that the ſaid Alexander Mackenzi the forfeiting perſon, had a right to 4000 merks per annum, o of the rents of the eſtate preferable to all debts, and thereſo that theſe rents ſhould not be ſequeſtrated. The reſponder made anſwers, and the Court, on the 31ſt of July 1719, pronou ced this interlocutor " in regard there was no inſtruction that t " 4000 merks of life-rent reſerved free of the burden of del " was allocated on any part of the ſaid eſtate, and as there are " inſtructions of the objections againſt the factor named, adh " to the ſaid Lord Ordinary's interlocutor, both as to the ſequ " tration and nomination of the factor, reſerving to the appell: " to be heard on his right to the ſaid 4000 merks, when he ſh " inſiſt therefore."

Willi

William Fraſer, however, not finding ſecurity, upon application of the reſpondents, Mr. Hugh Fraſer and Patrick Robertſon were on the 10th of November 1719, named factors of all the eſtate of Lovat, except the lands of Stratherrick and Abertarf, (upon which a factor was appointed by the perſons named in the deed of 1706, for ſecurity and payment of the young ladies' fortunes,) who gave ſecurity to be anſwerable as the Court ſhould direct.

The appeal was brought from "ſeveral interlocutory ſentences or decrees of the Lords of Seſſion of the 25th January, the 15th and 28th February 1718, the 23d of June, the 3d and 14th July, and 24th December 1719; and from the interlocutors and other proceedings in relation to the ſequeſtration of the eſtate of Alexander Mackenzie, late of Fraſerdale, and appointing a factor to receive the rents thereof." Entered, 13 Jan. 1719-20.

On the Sequeſtration and appointing a Factor on the Eſtate.—Heads of the Appellant's Argument.

The proceedings therein are wholly irregular, as not being had in any action brought by any of the reſpondents againſt the appellant, but only grafted upon his bill of ſuſpenſion in another cauſe, at the inſtance of other creditors, whoſe debts were merely perſonal, to which the reſpondents, or any of them, were in no ways parties, or ſo much as named therein, and which action was determined by the judgment in the former appeal.

By that judgment, the rents and profits of the eſtate are ordered to be paid to the appellant; but it would be abſolutely ineffectual to him, if at the ſuit of any pretended creditor, the Lords of Seſſion may, on a ſummary application, ſequeſtrate the eſtate and appoint a factor to receive the rents. And though by the ſaid judgment ſuch debts as are real, and did by the law of Scotland affect the eſtate at the time of the forfeiture, are allowed to be charged thereon in due courſe of law, yet the appellant apprehended that ſuch debts were to be paid by him out of ſuch rents and profits as ſhould be received by him, and until he ſhould make default therein, it would be unreaſonable to bring the charge of a factor on the eſtate, which muſt conſequently fall upon the appellant. And further the reſpondents' debts cannot be ſaid to be real in the ſenſe of the former judgment; for it will not be pretended, that they could have produced any real action to exclude the appellant's gift of eſcheat; and however they may be conſidered in ſome ſenſe to be real, ſo as to make them preferable to the debts and deeds of the grantor's heir, yet it will not thence follow that they are real with reſpect to the forfeiture; ſince at that time they could no more have produced a real action, than the mereſt perſonal debt whatever.

Heads of the Reſpondents' Argument thereon.

There was no actual ſuſpenſion of the action at the inſtance of the creditors, but only the reaſons of ſuſpenſion ordered to be heard. As creditors upon an eſtate which is much encumbered, have a right to apply to have it ſequeſtrated, and a receiver or

factor appointed; ſo, no doubt, the reſpondents were in th ſame caſe with other creditors; and it is certainly more juſt an equitable, that the rents of an eſtate, which are applicable to th ſatisfaction of creditors, ſhould be under the management of receiver who is appointed by the Court, and obliged to give ſe curity to pay as the Court ſhould direct, than of any other perſon There no injuſtice can poſſibly happen; every perſon will be pai according to his rights, and there will be no fear, that one onl receiving the rents may render the payment of the others pre carious; and it were contrary to equity that the appellant, whoſ advantage it is not to pay the creditors, ſhould be allowed to lev the rents of an eſtate to which they are preferable.

It was the appellant's own fault that he did not inſiſt in th reaſons of ſuſpenſion; he had notice, and might have done it and no doubt had there been any thing of moment to be objected he would have appeared by his counſel. Since he did not, ſeems improper for him to complain at this time.

As the judgment on the former appeal directs the payment o the rents to the appellant according to his grant, ſo it directs *that the real debts of the ſaid eſtate be charged thereupon in due courſe according to the law of Scotland.* This judgment gives no new right to the appellant, but leaves him as grantee, and the real creditors upon the foot of the law of Scotland in the like caſes; and it cannot be pretended but that creditors upon an eſtate are by that law entitled to a ſequeſtration of the eſtate for the juſt payment of their debts, and conſequently the judges have only purſued their uſual rules and methods in ſuch like caſes. And ſince there may be interfering intereſts among the creditors themſelves, as it is plain there are interfering intereſts between the grantee and the creditors, nothing can be more juſt, nor more agreeable, both to the intention and words of the decree of the Houſe of Lords, than that the rents ſhould be ſecured in due courſe of law for the benefit of all concerned, that is, by a ſequeſtration.

On the interlocutors finding the claims of the reſpondents to be real charges on the eſtate.—Heads of the Appellant's Argument.

As to the lady dowager's claim of 2000 merks annuity more than the 4000 merks provided to her by the ſaid Roderick Mackenzie's ſettlement, which ſhe has all along enjoyed, and never had or claimed more till ſince the forfeiture; it is to be ſuppoſed that the ſaid 4000 merks ſo ſecured to her were agreed by her to be taken in full of all ſhe could demand by her contract of marriage. From this it is apparent that ſhe was excluded by the prior incumbrances which had been purchaſed by the ſaid Roderick Mackenzie, whereby he got an abſolute right to the ſaid eſtate and more eſpecially ſince in the charter which he thereby obtained from the crown, there is no exception of her right by the marriage contract, nor is there any proof that ſhe ever claimed or received more than ſhe now enjoys.

As to the ladies' portions it is to be believed that they were paid by the ſaid Roderick Mackenzie before his death, when they had become due, being payable at their reſpective ages of ſixteen, or marriages; and more eſpecially ſince two of them have been married about ſixteen years. If they had not been ſo paid, the lands of Stratherrick and Abertarf muſt, according to his ſettlement, have been ſequeſtrated, and a factor appointed to receive the rents thereof the next year after his death, which happened in 1708, whereby they would ſoon have been paid; and yet no factor was appointed till after the grant of the life-rent eſcheat to the appellant.

As to the reſpondent Mackenzie's pretended debt, it may reaſonably be believed, that the ſame was paid by the ſaid Roderick Mackenzie in his lifetime, ſince no action had been brought, or the bonds ſo much as regiſtered, in ſo many years till after the forfeiture. But, further, this general clauſe in the ſettlement, wherein this pretended debt is not mentioned, could not make it a real charge on the eſtate at the time of the forfeiture, the reſpondent not being thereby entitled to bring any real action againſt the ſaid eſtate. And if clauſes of this nature ſhould have ſuch a conſtruction, no purchaſer of land in Scotland could be ſafe; and the appellant's caſe is much ſtronger than that of a purchaſer. Beſides, the reſpondent's decree of adjudication is null and void, as to the appellant, who was in poſſeſſion of the ſaid eſtate by virtue of his grant, before the ſame was obtained, and yet he was never made a party to the action.

The Court of Seſſion put it on the appellant to prove, that the claims of the reſpondents were ſatisfied, which it was impoſſible for him to do, the diſcharges or agreements relating thereto being all in the cuſtody or power of the forfeiting perſon, for whoſe intereſt theſe and other claims are colluſively ſet up to cover the eſtate againſt the appellant. On the other hand, if theſe claims be juſt, the lady dowager might have proved, that the 2000 merks annuity, more than the 4000 merks which ſhe has all along enjoyed, had been paid to her, at any time ſince the proviſion made for her by the ſaid ſettlement; and her daughters might have proved the payment of intereſt for their reſpective portions, within ſome reaſonable time before the forfeiture; and the reſpondent Mackenzie might have proved payment of intereſt, or given ſome other ſatisfactory proof of the juſtice of his debt; none of which have been done.

But if any debts ſhall, after a due examination, be found juſt and real, ſo as to affect the eſtate, the appellant is willing to pay the ſame in their due courſe, on their being aſſigned to him; and it would be very unreaſonable if ſuch creditors ſhould not be obliged to aſſign their reſpective debts, on payment thereof, but that they ſhall be ſtill kept up on the eſtate to exhauſt the whole rents during the attainted perſon's life: and more eſpecially ſince his lady has 300*l.* ſterling *per annum* allowed to her by the government out of all the reſt of the forfeited eſtates in Scotland: ſo

that if by theſe artifices they can cover the eſtate, *the family, i ſtead of being loſers, will be gainers by the treaſon.*

Heads of the Reſpondents' Argument thereon.

The lady dowager does not poſſeſs either her jointure or a nuity by virtue of Lord Preſtonhall's deed of ſettlement, but virtue of her marriage articles, and a charter from the crow and ſaſine thereon; and by theſe ſhe is entitled to 4000 mer out of certain lands, and an annuity of 2000 merks out of t whole eſtate, and no expreſſion in Lord Preſtonhall's deed can l any bar to her right, ſince ſhe does not claim under it. Beſide the appellant miſtakes the deed of ſettlement, for it contains n reſtriction of the reſpondent's right. All that is ſaid there i that when enumerating the particular lands out of which the ſai 4000 merks were iſſuing, and making a ſettlement of them Lord Preſtonhall does it with a reſervation of the reſpondent right out of theſe lands, but does by no means reſtrain her clai to that ſum only.

The portions to the daughters were not paid; and if the appel lant thinks he has any reaſon to inſiſt upon that, he is at liber to do ſo: but he cannot expect, as he pleaded below, that th reſpondents ſhould prove that they are not paid: that were t take the burden of proving a negative; and indeed, the appel lant never pretended that they were paid, but only inſiſted tha it was to be preſumed they were. Though the perſons entitled to name a factor upon the lands might for ſome time neglect t do it, becauſe the daughters might depend upon Mr. Mackenzie' paying them, that was no argument why they, when the eſtate went into other hands, might not apply to have a factor named for their better ſecurity; and as the deed of ſettlement under which Mr. Mackenzie, and conſequently the appellant, as grantee of his eſcheat, claims, is expreſsly burdened with that power, and the perſons entitled to execute it have done ſo, it is difficul to know why the appellant ſhould complain. The aſſignment to the rents of the lands in queſtion, and the power to name the factor being an expreſs burden, affecting both the diſpoſitiv clauſe and procuratory of reſignation contained in the deed o ſettlement, it gives the children a real right and immediate acce to the rents, preferable to any perſon claiming under that ſettle ment, as the appellant does.

It is denied that the reſpondent Mackenzie's debt was paid the reſpondent's tutor was, at the appellant's deſire, directed t make oath of the truth of the debt, which he offered to do, bu the appellant did not inſiſt upon it; and he is, by the very inter locutors complained of, allowed to inſiſt upon any defence of pa ment.

The debts of the grantor were certainly real by the ex preſs words of the clauſe in the deed of ſettlement, for *the lif rent of Alexander Mackenzie, and the fee of the maſter of Lova* are declared ſubject to the payment of all the grantor's debts and this is the method by the law and conſtant practice of Sco lan

and, of burdening conveyances of lands with debts owing to third parties, ſo as to make ſuch debts real; and this will certainly give a preference to the creditors of the grantor before the creditors, either of the perſons in life rent or in fee. It is true the creditors have no acceſs to the rents without an adjudication, that being the legal method of obtaining poſſeſſion; yet the debts are burdens upon the infeftments of property, and as ſoon as an adjudication is led thereupon, the adjudger has immediate acceſs, and will be preferred, not according to the date of the adjudication, but of the infeftment burdened, to all infeftments or real rights granted after that infeftment of property, though before the date of the adjudication; which is a demonſtrative proof that the debts are real from the date of the infeftment burdened.

After hearing counſel, *It is ordered and adjudged, that the ſeveral interlocuters of the Lords of Seſſion complained of, by which the eſtate in queſtion is ſequeſtered, be reverſed, without prejudice to any future ſequeſtration that may, upon juſt cauſe, be granted in a proper and regular method againſt the ſaid eſtate, for any ſuch debt as is chargeable thereupon, agreeably to the decree made in this Houſe in the former appeal; and that ſo much of the interlocutors complained of, as decree the annuity of* 2000 *merks to the Lady Dowager Lovat, and the debts claimed by and on the behalf of Alexander Mackenzie of Garlock, the infant, and other real creditors upon the ſaid eſtate, be reverſed; and that ſuch of the interlocuters as prefer the factor appointed for the lands of Stratherrick and Abertarf, in purſuance of the Lord Preſtonhall's deed, for the portions of the reſpondents, Anne, Catharine, and Margaret Fraſer, until the ſaid reſpondents ſhould be paid their reſpective portions of* 10,000 *merks each, with intereſt, be affirmed, without prejudice to the appellant, to object upon payment, or any other ground of law againſt the ſaid debts as accords.* Judgment, 1 April 1721.

For Appellant, *Rob. Raymond.* *Sam. Mead.*
For Reſpondents, *Ro. Dundas.* *Wil. Hamilton.*

The ſequeſtration in this caſe was ſet aſide upon an informality; it may be of importance to ſee from the record what was done therein in the ſubſequent proceedings between theſe parties.

The judgment is of great importance, in regard to the effect of a clauſe in a diſpoſition burdening the ſubjects conveyed with payment of the grantor's debts; and appears to form a leading caſe thereon.

Caſe 81. Sir Alexander Cuming, of Culter, Bart. - *Appel*
The Moderator and Preſbytery of Aberdeen, and Mr. Wm. Abercromby, - *Reſpon*

18th *April* 1721.

Writ.—A deletion, and a marginal note ſigned by the grantor of a ther of which were noticed in the teſting clauſe, being held to be judgment is reverſed.

Clauſe—A miniſter, who was alſo patron of his pariſh, being depri benefice by the preſbytery, conveys his right of patronage to a reſerving his own right as miniſter or preacher: the Court hav that the diſponee had not, nevertheleſs, the right of preſenting grantor's lifetime, the judgment is reverſed.

IN April 1679, Lord Torphichen conveyed the advo donation, right of patronage, and teinds, of the chur pariſh of Maryculter, in the dioceſe of Aberdeen, to Mr. White, then miniſter of the goſpel at the ſaid churc infeftment was thereupon taken in Mr. White's favour in 1683.

Mr. White being libelled by the preſbytery of Aberde having been guilty of ſcandal and treaſon during the late lion, in preaching and praying for the pretender, h after 55 years poſſeſſion, deprived by the preſbytery on of April 1717.

In Auguſt thereafter, Mr. White, by a diſpoſition bea be for an onerous cauſe, diſponed and conveyed to the ap the aforeſaid advocation, donation, right of patronag teinds. Part of this diſpoſition was of the following tenor

" Likeas I, the ſaid Mr. George White, by theſe p " ſell, annailzie, and diſpone from me, my heirs, and ſu " whatſomever, to and in favour of the ſaid Sir Al " Cuming, his heirs and aſſignees, heritably and irredee " but any manner of redemption, reverſion, or regreſs f " all and haill the advocation, donation, and right of pat " of the pariſh church of Maryculter, with the haill " profits, and emoluments belonging thereto, lying wit " dioceſe of Aberdeen, and ſheriffdom of Kincardine; t " with all right, title, intereſt, and claim of right, that " heirs, and ſucceſſors, predeceſſors and authors, had, h " any ways may have, claim, or pretend to the ſaid right " tronage, or to the teinds, great or ſmall, parſonage or vi " in any manner of way in time coming, either as tit " otherwiſe. Reſerving always to me;" After this, as poſition *had* been firſt engroſſed, ſtood the following " *My life-rent right of the benefice of the ſaid church durin* " *days of my lifetime, as not acknowledging any vacancy t* Theſe words, however, were drawn through with a pen, b ſtill to remain legible; and oppoſite to them, on the marg

written this marginal note: "*To me, the ſaid Mr. George White, all right, title, intereſt, claim of right, that I can pretend as miniſter and preacher of the word of God in the ſaid church, during all the days of my lifetime.*"

This deletion and marginal note occurred three times in the diſpoſition: the marginal note was duly ſigned by Mr. White, but no notice was taken of it, or of the deletion in the teſting clauſe. Upon this diſpoſition the appellant was infeft in September 1717.

The appellant afterwards tendered a preſentation of three or four perſons, or any of them that ſhould be approved of by the preſbytery and other church judicatories to ſerve in the ſaid cure, and applied to the moderator of the preſbytery of Aberdeen, to call a preſbytery and receive his preſentation. Having met with delay, he renewed his requiſition to the moderator, under form of inſtrument by a notary public. The appellant afterwards made application to the provincial ſynod, to interpoſe their authority, and order a preſbytery to meet *pro re nata*. But that ſynod having refuſed to do ſo, the preſentation was again tendered to the moderator of the preſbytery, and to the moderator of the ſynod in full convention; and the appellant entered his proteſtation, that their ſo refuſing ſhould not prejudice his right of preſentation after ſix months, nor give the preſbtery the benefit of preſenting, *jure devoluto*.

After the lapſe of ſix months, the preſbytery preſented the reſpondent Mr. William Abercromby to this church and pariſh; and upon their preſentation he was accordingly inſtituted. The appellant again proteſted againſt this; and afterwards brought an action of declarator before the Court of Seſſion againſt the reſpondents, concluding that his right might be aſcertained, and that the proceedings of the preſbtery in preſenting Mr. Abercromby might be declared void; and that the appellant might be at liberty to diſpoſe of the intermediate profits of the living for pious uſes within the ſaid pariſh, in terms of the act of parliament in that behalf. 10 Ann. c. 12.

The reſpondents made defences ſtating, that the diſpoſition was null and void, by the deletion of ſeveral clauſes therein; and the marginal notes not being mentioned in the teſting clauſe, it was to be preſumed that the deed was vitiated *ex poſt facto*. That the ſaſine alſo appeared to have been razed, which afforded an additional argument againſt the diſpoſition. The appellant, in anſwer contended that it was *jus tertii* to the reſpondents to object to Mr. White's diſpoſition; that it and the ſaſine could never be taken away but by improbation. And Mr. White appeared judicially in proceſs, and declared that the deletions and marginal notes were done by his expreſs order, and duly executed by him.

The Lord Ordinary, having reported this matter to the whole Court, their lordſhips at firſt repelled the objection founded upon the obliteration and razure of the diſpoſition and ſaſine; and found that the appellant had the *right of patronage of the ſaid church of Maryculter*.

But

But the reſpondents having preſented a reclaiming petition, after anſwers for the appellant, the Court, on the 19th day of February 1720, "ſuſtained the defence propponed by the preſby-"tery, and aſſoilzied from the declarator."

The appellant thereupon reclaimed; and the reſpondents having made anſwers, the Court, on the 6th of December 1720, "declared the appellant's right, with this quality, that his right "of preſentation cannot take place during Mr. White's life-"time."

The appellant again applied by petition againſt this laſt interlocutor, and offered to prove, by the oaths of the grantor, writer, and inſtrumentary witneſſes, that the deletions and amendments were made by Mr. White's order before the execution of the deed: and the grantor at ſame time tendered his oath thereupon, and declared that he meant no more by the words deleted, or by the marginal notes added to the deed, and ſigned by him, than a reſervation of his right as preacher and miniſter; but did not pretend any right to the patronage. After anſwers for the reſpondents, the Court, on the 30th of December 1720, "adhered to "their interlocutor, and refuſed the deſire of the petition."

Entered, 23 Jan. 1720-1. The appeal was brought from "an interlocutory ſentence or "decree of the Lords of Seſſion in Scotland, of the 19th of Feb-"ruary 1720, and from part of an interlocutor of the 6th of "December, and likewiſe from an interlocutor of the 30th of "December, 1720."

Heads of the Appellant's Argument.

There is no law, ſtatute, or cuſtom for making void any writing, by reaſon of any deletion, amendment, or marginal note,
1681, c 5. duly made and ſigned by the grantor. For all that the act of parliament, in relation to probative writs, requires, is, that the names and deſignations of the writer and witneſſes be inſert in the body of the writing, as they are in this caſe. And Mr. White has appeared judicially, and acknowledged the diſpoſition, as it ſtands, to be a true deed, *ſimul et ſemel.*

Neither the reſpondents, nor any others who were not parties nor privies to the deed, could object or found upon the clauſe of reſervation in favour of the grantor; none but the grantor himſelf or his heirs could do this; eſpecially againſt his own declared will and intention. And Mr. White never pretended any right to the patronage, or to object to the appellant's preſentation, having only reſerved his right and intereſt as preacher of God's word at the ſaid church; of which he then conceived himſelf unjuſtly deprived.

Mr. White, the grantor, neither did nor could pretend, by the clauſes deleted, which now *pro non ſcriptis habentur*, nor by the clauſes on the margin ſigned by him in place thereof, any right, even as *preacher of the word of God* at the ſaid church, but ſuch a right as he had *de jure*; for it was never intended, that he ſhould reſerve a right which he had not. And it is ſurely very improper

for

r the reſpondents to found upon any pretence of right he had; ter they themſelves, as judges, had determined that he had for-ited his right.

As the reſervation of Mr. White's right as preacher of God's ord, could not create any nullity in the appellant's title; ſo the reſbytery were not judges of the validity or nullity of the diſpo-ion, which indeed they never ſaw nor looked upon, till the ion was brought againſt them in the Court of Seſſion. And ierefore that could be no motive for them, in contempt of the w, and even contrary to the very act of parliament which firſt 1592. c. 116. nſtitutes preſbytery, to reject the appellant's preſentation; or an xcuſe for their judging at any rate of the appellant's title, far ſs for condemning it prophetically, without ſeeing it.

Heads of the Reſpondents' Argument.

The razure is in the moſt material part of the deed, relative to the preſent queſtion, which is, whether the appellant can preſent to this church or benefice during Mr. White's life? That entirely and ſolely depends upon the import of the words ſo razed.

Taking the words razed to have been what the appellant inſiſts, they are a ſufficient bar to his claim; for a reſervation of the benefice to Mr. White during his life, will as effectually prevent the appellant from preſenting during Mr. White's life, as a reſervation of the right of patronage, for life; for there ſeems no poſſibility in this caſe to diſtinguiſh them.

Though the appellant had given evidence, as he offered to do, by Mr. White the grantor, and the inſtrumentary witneſſes, that the razure was made, and marginal notes added, before the execution of the deed, yet that would not now ſupply the defect; ſince by the law and conſtant uſage of Scotland the deed itſelf ought to have mentioned the razure to have been made, and the marginal note added before the execution, otherwiſe it is null; nor can that defect be ſupplied by witneſſes.

Were evidence to be uſed, yet Mr. White's evidence in this caſe could not be admitted, for he was a party to the action, and the perſon for whoſe uſe it was carried on, and who, if the church could be kept vacant, would enjoy the profits of the living: and the inſtrumentary witneſſes are likewiſe ſuſpicious, ſince the one is ſon to the grantor, and the other ſervant to the appellant.

The appellant at firſt did not inſiſt, that theſe alterations were made upon the deed before its execution, but only before he ſigned the preſentation in queſtion; and indeed it appears from the very face of the deed, that the alteration was not made before the deed was executed. For the very ſame razure and marginal notes that are in the diſpoſition, are likewiſe in the ſeiſin, and yet this laſt is dated 40 days after the firſt.

Taking the words, as they ſtand on the margin, viz. "Reſerving to Mr. White all right, title, and intereſt, that he could pretend to as miniſter and preacher of God's word in the ſaid church during all the days of his lifetime," they are a certain

tain bar to the appellant to preſent any other during Mr. V life, for otherwiſe the reſervation imported nothing.

The appellant ſeems to be too haſty in praying that hi to preſent, and power to diſpoſe of the profits during the v might be declared and affirmed; for that with ſubmiſſior not be done, even were the interlocutors complained of re for it will ſtill remain a queſtion, if the appellant, (were hi of patronage eſtabliſhed) have duly executed that right, an larly preſented. That queſtion never was before the C Seſſion, and is ſtill open and undetermined; and ſo long remains a queſtion, the appellant cannot pretend to ha right to diſpoſe of the vacant ſtipends, becauſe it does n cannot, appear there is a vacancy, till that other queſt determined.

Judgment, 18 April, 1721. After hearing counſel, *It is ordered and adjudged, that t interlocutor of the 19th of February* 1720, *and ſo much of th locutor of the 6th of December as is contained in theſe words, "this quality, that his right of preſentation cannot take place "Mr. White's lifetime," and the interlocutor of the* 30*th of ber* 1720 *in affirmance thereof, be reverſed.*

For Appellant, *Rob. Raymond. Tho. Kennedy. Wm.* For Reſpondent, *Ro. Dundas. Will. Hamilton.*

Caſe 82. The Commiſſioners and Truſtees of the Forfeited Eſtates, - - - *Appella*

Mr. David Erſkine of Dunn, one of the Senators of the College of Juſtice, - *Reſpo*

19th *April* 1721.

Compenſation againſt an Aſſignee.—Forfeiture for Treaſon.—A bond Panmure's was conveyed to an onerous aſſignee on 21ſt April 1 an act paſſed on 7th May 1716, his lordſhip was attainted of tre November 1715: the holder of the bond, in January 1717, ack upon oath, that he had purchaſed in April or May 1716, from L mure, as her huſband's attorney, a quantity of grain, and had the price: the truſtees for forfeitures found that the bond was co againſt the aſſignee; and that an arreſtment uſed on 9th May 1 a horning ſigneted on October thereafter, were no ſufficient in bus their judgment was reverſed by the Court of Delegates, and ſuc affirmed upon appeal.

BY an act of 1 Geo. 1. which received the royal aſſent 7th May 1716, James Earl of Panmuir was attainted treaſon, from the 13th of November 1715, and his eſta veſted in the appellants for the uſe of the public from the June 1715.

In June 1717, the reſpondent entered a claim before the appellants, upon the Earl of Panmuire's eſtate for the ſum of 5000 merks, with intereſt, ſince Candlemas 1715, as aſſignee of a bond granted by the ſaid Earl of Panmuire. The circumſtances as ſtated by the reſpondent were, that the earl having borrowed from George Dempſter, merchant in Dundee, the ſaid ſum of 5000 merks, the earl, for repayment thereof, granted Dempſter his bond on the 5th of February 1715; and on the 21ſt of April 1716, Dempſter, in conſideration of the reſpondent's paying to him the principal and intereſt then due upon the ſaid bond, aſſigned the ſame to the reſpondent; who thereupon arreſted the rents in the tenants' hands, on the 9th of May 1716, and a horning was ſigneted the 26th of October thereafter.

To this claim, the appellants objected that Dempſter, the aſſignor, had, upon oath before the appellants on the 24th of January 1717, acknowledged that in April or May 1716, he had bought from the late Counteſs of Panmuire, who was factrix for the earl, wheat and meal, to the value of 3751*l.* 10*s.* 9*d.* Scots; and that he paid the price thereof to the Counteſs, and got her diſcharge for the ſame: that this payment, being after the forfeiture, was in Dempſter's own wrong; and that conſequently he ſtood debtor to the appellants in as much as would compenſate the bond claimed on.

The appellants, by their decree in October 1719, "found that "no legal intimation was made of the ſaid aſſignation by the ſaid "George Dempſter, to the truſtees, preceding the date of the "ſaid Dempſter's depoſition made the 24th of January 1716-17, "upon record in this court, and now read, whereby he acknow-"ledges that he, the ſaid Dempſter, received the ſum of 3751*l.* "10*s.* 9*d.* Scots, out of the ſaid eſtate, for crop 1715, and "other very conſiderable ſums; and he not having yet accounted "to the commiſſioners and truſtees for the ſame, the horning "produced for the claimant, though bearing date before the "time of the cedent's ſaid depoſition, yet is after the attainder "of the ſaid late Earl, and no charge was uſed thereupon; and "therefore find the ſaid ſum of 5000 merks Scots money, with "intereſt thereof, ſo aſſigned by the ſaid Dempſter to the "claimant as aforeſaid, to be extinguiſhed by compenſation, to "the extent of the ſaid ſums intromitted with by Dempſter; "and do therefore diſmiſs the ſaid claim, in ſo far as the ſame is "compenſed as aforeſaid, together with the penalty contained in "the ſaid bond, which penalty is hereby abſolutely diſallowed: "but as to the reſidue of the ſaid debt not thereby compenſed, "the ſaid commiſſioners and truſtees do find that the ſame is a "juſt, true, and lawful debt, to which the ſaid claimant is juſtly "entitled, as a lawful creditor on the ſaid eſtate."

Againſt this decree, the reſpondent preſented his appeal to the Court of Delegates; and after a hearing of the cauſe, and memorials given in by the parties, the Court of Delegates, on the 23d of December 1720, "reverſed the aforeſaid judgment and "decree of the ſaid commiſſioners and truſtees."

Entered, 3 Feb. 1720-1.

The appeal was brought from "a decree of the Lords Del "gates of the 23d of December 1720."

Heads of the Appellants' Argument.

It is an undoubted principle of the law of Scotland, that where the ſame perſon is debitor in a ſum, and has a counter claim againſt his creditor for the like ſum, that thoſe claims are mutually extinguiſhed by compenſation, in the ſame manner as if each claim had been paid and ſatisfied by the perſon who was debitor in it; and conſequently, granting it were true (which the appellants know not) that the 5000 merks pretended to have been owing by the late Earl of Panmuire to Dempſter, formed a true and lawful debt, yet the public being now in the room and right of the late Earl of Panmuire, and Dempſter having become debtor to the public for the rents of the eſtate of Panmuire, equal to the extent of his debt, levied by him without juſt title after the forfeiture, that debt was thereby extinguiſhed by compenſation, or payment out of the effects of the debtor, and could not after that be lawfully aſſigned to the reſpondent, or any other perſon whatſoever.

It was objected, that Dempſter's oath was not a good proof againſt the reſpondent, his aſſignee, for an onerous conſideration: but the oath of the cedent is a good proof in many caſes, even in prejudice of the aſſignee. Such as, firſt, if the debt be rendered litigious, before the aſſignation, which is the preſent caſe; ſince by the forfeiture all the debts on the forfeited eſtate were made ſubject to a queſtion, and claimants were put under the neceſſity of proving their debts to be true debts, otherwiſe they could not be allowed as a charge upon the eſtate. The oath of the cedent is likewiſe a good proof againſt the aſſignee, where the aſſignation is not completed by being lawfully intimated to the debtor in the method the law directs, which is likewiſe the preſent caſe; for the reſpondent's aſſignment never was intimated in a legal way.

It was objected alſo, that Dempſter's oath muſt be taken with all its intrinſic qualities; and at the ſame time that he ſwears to the receiving of the grain, he ſwears he paid for it to the late Counteſs of Panmuire. But the paying for the grain is not an intrinſic quality: if there was any payment, it was a conſiderable time after; his oath is a good proof againſt himſelf, but it can be no proof for him. If he did pay it, it was an unlawful payment; for the law directs the profits of forfeited eſtates to be anſwered and paid into the receipt of exchequer, not to the wife of a forfeiting perſon.

The time of Dempſter's intromiſſion, and pretended diveſting himſelf of this and other debts, happening ſo preciſely about the ſame time, is a convincing proof of the contrivance entered into by the parties to cover the eſtate from the public. It ſignifies nothing what was the date of this ſimulate aſſignation, but only of the time of the legal intimation; and in this caſe there was no legal intimation before entering the reſpondent's claim. An ar-

rellment

ſtment in the tenants' hands was indeed uſed after Dempſter's tromiſſions, but that was no notice to thoſe concerned for the ıblic, who came in place of the forfeiting perſon: Letters of rning were afterwards obtained in the month of October 1716 ainſt the debtor, the Earl of Panmuire, which looks yet more traordinary, he being then undoubtedly attainted. And all ch proceſſes uſed againſt forfeited eſtates, are already by act parliament, declared to be void, and of no effect.

Heads of the Reſpondent's Argument.

As the only foundation for this demand againſt Dempſter is his vn oath, ſo that muſt be taken altogether, which is very far om eſtabliſhing him a debtor to the late Earl of Panmuire; for only ſwears, that he, as a merchant, in the ordinary courſe his buſineſs, purchaſed from the late Counteſs certain quantities grain, and thereupon made payment to her of the agreed ce. So what he bought was from the lady, and he has paid for at he ſo bought.

Though the act for attainting the ſaid earl did by a retroſpect aint him from the 13th day of November 1715, unleſs he uld ſurrender himſelf on or before the laſt day of June 1716; in fact this bargain was made by the Lady Panmuire, factrix her huſband, and the money paid to her before ever that act parliament paſſed into a law (*a*): ſo that were the debt even in mpſter's own perſon, it were a great hardſhip indeed to oblige who had once paid the money, for the purchaſe he *bonâ fide* de, to pay it over again. If the appellants have any demand, againſt the Lady Panmuire; and in fact, the appellants do rge her with this very ſum.

Whatever might have been ſaid, in caſe the debt had ſtill been the perſon of Mr. Dempſter, yet that cannot militate againſt reſpondent, an aſſignee for an adequate valuable conſideration, thout any manner of notice of this pretended demand, or title compenſation: and were it the caſe, that Dempſter had by his h eſtabliſhed himſelf a debtor to the late Earl of Panmuire, to inſiſt that that debt ſhould compenſate and extinguiſh a debt ainſt a juſt aſſignee, who paid a valuable conſideration for it, e introducing a great hardſhip indeed.

Beſides, compenſation is never allowed againſt an aſſignee, but ere the debt is liquidated and eſtabliſhed againſt the aſſignor ore intimation of the aſſignment. Now this debt is not yet uidated againſt the aſſignor, for it cannot be ſaid that his oath uidates the debt, becauſe he ſwears that the debt is paid; nor it be done without an action between Dempſter and the ap-lants.

The aſſignment was intimated by raiſing and executing arreſt-nts on 9th May 1716. Dempſter's oath was not made till uary 1716-17, and nothing is more certain in the law of

) The act was paſſed 7th May 1716; Dempſter's oath ſpeaks generally to the of his tranſaction with Lady Panmuir, as in April or May 1716.

Scotland, than that diligence by arreſtment is as ſufficient an intimation of an aſſignment, as a perſonal intimation under the hand of a public notary to the obligor; and this was the moſt proper way, ſince the obligor was not to be found; and a horning was likewiſe ſigneted thereon.

Judgment, 19 April 1721. After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed: and that the decree of the Lords Delegates in Scotland, therein complained of, be affirmed.*

For Appellant, *Rob. Raymond.* *Rob. Dundas.*
For Reſpondents, *Charles Erſkine.* *Will. Hamilton.*

Caſe 83. William Duff of Dipple Eſq; - - *Appellant;*
George Gordon of Glaſtirum Eſq; - - *Reſpondent.*
Et e contra.

21ſt *April* 1721.

Real and Perſonal.—A diſpoſition is granted by a father to his ſon of the principal eſtate, burdened with all debts contracted or to be contracted by the father; in a queſtion between an onerous purchaſer of the ſaid eſtate, and an aſſignee of two perſonal bonds granted by the ſaid diſponer, the Court found that the debts were a real burden upon the ſubject diſponed; their judgment is reverſed.

Writ.—The writer of a bond is deſigned "Patrick Gordon, ſervant to "Alexander Dunbar;" the Court of Seſſion found this a nullity. Upon this point the Houſe of Lords did not decide, but diſmiſſed the appeal.

Homologation.—It was alleged that the grantor of the bonds had homologated the ſame by payment of intereſt, &c; the Court found that ſuch alleged homologation did not hinder the onerous purchaſer of the eſtates before mentioned, from queſtioning theſe bonds: upon this point alſo the Houſe of Lords did not decide, but diſmiſſed the appeal.

BY a contract, executed previous to the marriage between Sir Alexander Innes, and Mrs. Jane Rollo, in 1678, Sir Alexander bound himſelf to ſettle the lands of Coxtown, and other therein particularly mentioned, upon the heirs male to be procreated of that marriage; whom failing to his heirs male of any other marriage, with ſeveral other ſubſtitutions of heirs. And Sir Alexander afterwards in 1707, by a diſpoſition reciting the ſaid marriage-contract, conveyed the ſaid lands to his eldeſt ſon George, the heir male of the marriage, with other ſubſtitutions of heirs, with and under the burden always of payment of all the lawful debts contracted, or to be contracted by the ſaid Sir Alexander Innes, and particularly of the payment of his younger children's proviſions: all which debts and deeds the ſaid George Innes becomes by his acceptation of the ſaid right, tied, bound, and obliged to ſatisfy, pay and perform, as if they were ſpecially ſet down, and in the ſame manner as the ſaid Sir Alexander is bound and obliged therefore himſelf, with and under which proviſions and conditions the right and diſpoſition is declared to be granted and accepted, and no otherwiſe.

In

In 1712 Sir George Innes, after his father's death took a charter from the crown upon the procuratory of reſignation contained in the ſaid diſpoſition, and the ſeveral proviſions of the diſpoſition 1707, were repeated in this crown charter. He afterwards ſold the ſaid lands to the appellant Mr. Duff, for an onerous conſideration, being about 25 years purchaſe of the rents; and Mr. Duff was infeft on a diſpoſition from Sir George on the 10th of July 1714. Mr. Duff applied part of the price in the diſcharge of ſuch debts as appeared from the records to be charged on the eſtate, and paid the remainder of the price to Sir George.

In 1719 the reſpondent Mr. Gordon, who had acquired right in 1718, by aſſignation, to certain bonds executed by Sir Alexander Innes firſt mentioned, brought an action before the Court of Seſſion againſt Sir Alexander Innes, a minor, ſon of the ſaid Sir George, as repreſenting Sir Alexander his grandfather, and concluded to have the lands of Coxtown adjudged to in him ſatisfaction of his demand. The appellant Mr. Duff appeared as a defender to this action, and ſtated that he was a purchaſer of theſe lands for a valuable conſideration without notice of theſe bonds, upon which Sir Alexander had never been inhibited, and that none of theſe bonds were put upon record till 1720, ſix years after his purchaſe. But the reſpondent inſiſted, that his demand was a real lien upon the lands in queſtion, becauſe by the diſpoſition by Sir Alexander to his ſon Sir George, under which the appellant claimed, Sir George was expreſsly charged with the payment of all Sir Alexander's debts, and therefore had a right to adjudge.

After a report by the Lord Ordinary, the Court, on the 2d of December 1719, "found that the debts were a real burden upon "the ſubject diſponed." And on the 1ſt of January thereafter, "adhered to their former interlocutor."

Mr. Duff the appellant afterwards took an objection to two of the bonds, claimed on, upon the act 1681. c. 5. In theſe two bonds the teſting clauſe runs thus: "written by Patrick Gordon "ſervant to Mr. Alexander Dunbar;" which was, he contended, no valid deſcription. To this Mr. Gordon anſwered, he could prove that Dunbar lived at Caſtle Gordon where the bonds were executed, and had at that time a ſervant called Patrick Gordon. The Lord Ordinary at firſt repelled the objection, but the appellant having reclaimed, after anſwers, the Court on the 13th of February 1720, "found that Patrick Gordon the writer of the ſaid "two bonds ſo granted by Sir Alexander Innes, is not ſufficiently "deſigned therein; and therefore ſuſtained the nullity proponed "againſt the ſaid two bonds." 1681, c. 5.

The reſpondent Mr. Gordon afterwards pleaded, that Sir Alexander had homologated theſe bonds, by paying part of the intereſt due thereon, and drawing a bill upon his factor for part of the principal, but which was not paid. The appellant anſwered, that there was no proof, that any intereſt was paid, and that the bill drawn upon the factor had no relation to the bonds in queſtion. The Court on the 25th of February 1720, "found "that the homologation alleged by Mr. Gordon did not hinder

" Mr. Duff from queſtioning the bonds purſued on, and then
" fore adhered to their former interlocutor, finding the writer
" theſe two bonds not ſufficiently deſigned, and refuſed the d
" ſire of the petition." And the Court afterwards on the 9th
June 1720, adhered to this laſt-mentioned interlocutor.

Entered, 19 Dec. 1720. The original appeal was brought by Mr. Duff, from " an i
' terlocutory ſentence or decree of the Lords of Seſſion of t
" 2d of December 1719, and the affirmance thereof, the 1ſt
Entered, 13 Jan. 1720-1. " January following;" and the croſs appeal was brought by M
Gordon, from " ſeveral interlocutory ſentences or decrees of t
" ſaid Lords of Seſſion of the 13th and 25th of Februray a
" 9th of June 1720."

On the original Appeal: Heads of the Appellant Duff's Argument.

Purchaſers are always ſafe by the law of Scotland, when
debt nor incumbrance upon the land to be purchaſed appea
upon record, that is what the law conſtrues to be notice, and
charge a purchaſer in any other way muſt unhinge all manner
ſecurities, and defeat the very intention of the laws, with rega
to the recording of titles in Scotland. The general clauſe in t
diſpoſition ſubjecting the ſon to the payment of the father's debt
could be no notice to the purchaſer what theſe debts were, ſinc
neither were they upon record, nor particularly mentioned, whic
ought to be done when ſuch debts are intended to be a re
charge upon the eſtate. In the caſe in queſtion, even no ſuit wa
commenced either againſt Sir Alexander or Sir George his ſo
till ſome years after the appellant's purchaſe.

This argument is ſtill ſtronger againſt the reſpondent, wh
purchaſed or got an aſſignment of theſe debts in queſtion, eve
after the appellant's purchaſe; of which he could not but hav
notice, for the purchaſe was treated of ſome months before
was made, and publickly known in the country; the appellan
was infeft, and that infeſtment regiſtered, and the reſponden
who lived within a few miles of the appellant, could not bu
know of all this tranſaction.

It does not appear to have been the intention of Sir Alexand
to make theſe debts a real charge upon his eſtate; for as the
are no particular debts ſpecified, ſo the clauſe can import n
more than that the ſon ſhould not uſe his right of fee in frau
of the creditors, but that he ſhould be bound to pay them, that i
he perſonally. The payment is directed upon the perſon, receive
of the rights, and not upon the ſubject. The expreſs words of th
deed are " that the grantee ſhall only be ſubject to the pay
" ment of the debts, in the ſame manner as the grantor himſe
" was." The grantor was only bound perſonally, and thei
debts were no real lien or burden on the lands in his perſon, an
conſequently they cannot be ſo in the perſon of the ſon.

The proviſo ſubjects the grantee to the payment, not only of th
debts then contracted, but alſo of what he ſhould afterwards con-
tract. Theſe laſt, of their own nature, could not be real; and it
ſeems pretty incongruous that any debt not real at the time of the
con-

onveyance ſhould afterwards become real without any diligence done by the creditor (*a*).

On the croſs Appeal: Heads of the Appellant Gordon's Argument.

Both the bonds in queſtion are of the ſame date, bearing the ſame deſignation of writer and witneſſes, dated at the ſame place, and ſubſcribed without the leaſt variation in form, an argument the writer deſigned himſelf as uſual; beſides the intention of the act of parliament is ſufficiently attained, that was only to aſcertain the writer and witneſſes' names, the better to diſcover the truth or falſity of any deed that might be called in queſtion; but the preſent deſcription ſufficiently anſwered that, ſince as to Mr. Alexander Dunbar it is certain who he was, and there was no other of that name, who had a ſervant by the name of Pat. Gordon, who is deſigned writer of this bond: and as the ſaid Mr. Alexander Dunbar was perfectly well known to reſide at Caſtle Gordon, where the bond is dated, ſo being a catholick prieſt, it might be ſome reaſon why he did not give himſelf any farther deſignation, which laſt facts, if neceſſary, were offered to be proved; and that he was ſo deſigned in ſeveral other writings.

The obligor in the bonds had paid part of the intereſt to the obligee, and in payment of part of the principal had drawn a bill upon his factor; the bill not being accepted, was proteſted and duly negotiated. This was a homologation by the obligor, ſo that he was barred from making this objection, and ſo conſequently ought the reſpondent to be, who purchaſed the eſtate ſubject to the obligor's debts.

Heads of the Reſpondent Duff's Argument thereon.

The intention of the act no doubt was to prevent vague and uncertain deſcriptions, ſuch as in the caſe in queſtion; for it muſt be admitted if the writer had been Mr. Alexander Dunbar, without any other deſcription, the ſame would not be good, becauſe there may be ſeveral of that name: the writer then being deſigned ſervant to Mr. Alexander Dunbar, would never vary the caſe, ſince it is not ſuch a deſcription, as to aſcertain the perſon, and diſcriminate him from others; and his being ſo deſigned in other writings can be no argument for ſupporting this.

The ſeveral facts inſiſted upon, and pretended to be made uſe of, in order to aſcertain the perſon, are to no purpoſe, ſince the law expreſsly enacts, "that the want of a deſignation of writers and "witneſſes is not ſuppliable by condeſcending upon the deſigna-"tion of writers or witneſſes," ſo that if the writer is not in the deed itſelf ſufficiently deſcribed, that can never be ſupplied by any after condeſcendance: nay, this was the very deſign of this act; for the law before that time required the writer and witneſſes to be deſigned, but then the want of that uſed to be ſup-

(*a*) The argument of Mr. Gordon on the original appeal has not been found; as his counſel gave up the point of law at the hearing appeal, it is probable that he had no printed caſe. The argument on the other points is taken from Mr. Duff's caſe.

plied by an after condeſcendance upon a proper deſcription of writer and witneſſes; and to prevent the inconveniences ariſing by ſuch condeſcendance was the principal view of this act.

There is no proof that any ſuch intereſt was paid, it being only founded on the obligee's own allegation; and the bill drawn by the obligor upon his factor has no manner of relation to the bonds now in queſtion; and even the payment of intereſt by the obligor could not have been pleaded in bar to any ſuit brought by the obligor himſelf to ſet aſide a deed or obligation declared by law void and null, much leſs can it be made uſe of againſt the reſpondent, who is a purchaſer for a valuable conſideration, without any notice of this debt, and conſequently is entitled to protect his purchaſe by the nullities ariſing from the face of the obligations themſelves, which are made uſe of in order to affect his purchaſe; and he is the rather juſtifiable in inſiſting upon the ſtrictneſs of the law, ſince he has already paid a full and adequate price for the eſtate in queſtion.

Journal, 21 April 1721.

Counſel being this day called in and heard upon the appeal and croſs appeal, and the ſeveral anſwers thereto, *the counſel for the appellant, William Duff, having opened the matter of his appeal, and ſhewn "that the complaint of the interlocutors finding the bond debts in queſ- "tion real burdens on his eſtate is founded upon a point already adjudged "by this Houſe:"*

The counſel for the reſpondent, George Gordon, admitted it to be ſo, and therefore would not enter into the defence of the ſaid interlocutors: and further declaring "that he, looking upon the reverſal of theſe in- "terlocutors to put an end to the whole conteſt between the parties in "theſe appeals, declined to trouble the Houſe with arguments in ſup- "port of the bonds in queſtion, againſt the interlocutors complained of "by the appeal of the ſaid George Gordon."

Wherefore the counſel for the ſaid William Duff prayed, "that the "appeal of the ſaid George Gordon be diſmiſſed."

Judgment.

And upon due conſideration had of what was offered on either ſide in the ſaid cauſes, it is ordered and adjudged, that the ſaid interlocutor of the 2d of December 1719, finding the bond-debts real burdens upon the eſtate in queſtion, and the interlocutor of the 1ſt of January following in affirmance thereof be reverſed; and that the petition and appeal of George Gordon, complaining of the ſaid interlocutor of the 13th and 25th of February 1720-1, and the interlocutor of the 9th of June laſt, in affirmance thereof be diſmiſſed; without prejudice to any demands the ſaid appellant George Gordon may have upon the two bonds in queſtion againſt any other perſon beſide the ſaid William Duff the original appellant.

For William Duff. *Ro. Dundas. Will. Hamilton.*

It was in the caſe *Lord Lovat* v. *Emilia Dowager Lady Lovat and others*, 1ſt April 1721, No. 80 of this collection, that the point of *real and perſonal*, noticed in the judgment was decided. The judgment here reverſed upon that point is noticed in the Dictionary as an exiſting caſe, voc. *perſonal and real*, vol. 2. p. 67.

Ex parte

David Falconer of Newtown Eſq; - - *Appellant;* Caſe 84.

Dame Elizabeth Falconer, Relict of Sir Charles Ramſay, late of Balmain Bart., Sir Alexander Ramſay, now of Balmain, Mr. David Archer, Miniſter of the Goſpel at Laurencekirk, or Conveth, and Mr. Robert Mortimer, Schoolmaſter there, - *Reſpondents.*

4th *May* 1721.

Preſumption.—Two mortifications for educating children at a pariſh ſchool, are found in the grantor's repoſitories after his death; the one born date four years after the other, but was in ſome terms with the firſt, with this alteration only, that a larger ſum was mortified, and a greater number of boys to be educated: the Court having found that both ſubſiſted as diſtinct deeds; the judgment is reverſed.

The Court having alſo refuſed a proof by the inſtrumentary witneſſes, of the donor's intention; their judgment is reverſed, and liberty given to examine the inſtrumentary witneſſes.

ON the third of June 1712, Sir Alexander Falconer, late of Glenfarquhar, the appellant's uncle, deceaſed, by a deed reciting, that in regard it had pleaſed God, in his mercies, to increaſe and bleſs his means and effects, and lengthen his days to a very great age; Therefore, out of the charitable regard he had to the education of poor children, either of his own name, or born within the pariſh of Conveth, where his predeceſſors lived and reſided, and for the encouragement of letters and learning, he left and appointed the ſum of 50 merks Scots, and 18 bolls of meal, to be paid yearly by his heirs out of the lands of Middleton, for the uſes following, viz. the ſum of 50 merks to be paid yearly to the ſchoolmaſter at the church of Conveth, for his encouragement, who ſhould therefore be bound to teach the children of poor men, who were not able to pay ſchoolmaſters' fees, gratis; and the ſaid 18 bolls of meal for maintaining three boys, at the rate of ſix bolls of meal yearly; which boys ſhould be preſented by his heirs and ſucceſſors, of the name of Falconer, to be paid by two half-yearly payments, and to commence at the firſt term of Whitſunday or Martinmas after his deceaſe. And the ſaid boys were to wear a badge.

The ſaid Sir Alexander Falconer, by another deed, bearing date the 7th of Auguſt 1716, with the ſame recital verbatim as the former, appointed 40*l.* Scots (being 60 merks) to be paid to the ſchoolmaſter at the church of Conveth yearly, and 24 bolls of meal, for the maintenance of four poor ſcholars, payable out of the ſame lands, by the ſame payments, and to be preſented in the ſame manner as the former. In both deeds the reſpondents were appointed truſtees.

Sir

Sir Alexander dying ſoon after, the appellant, his nephew, ſucceeded as heir to his eſtates. After his death both the ſaid deeds of mortification were found amongſt his papers. The appellant apprehending that it was not the intention of Sir Alexander that both deeds ſhould ſubſiſt, but that the latter deed ſhould ſuperſede the former, declined to pay any but the laſt. The reſpondents, however, inſiſting upon both, the appellant in 1719 brought his action of reduction and declarator, before the Court of Seſſion, to ſet aſide the firſt mortification, and to have it declared that the laſt was the only ſubſiſting deed: and the reſpondents brought a counter action to have it declared, that both were ſubſiſting deeds.

Theſe cauſes coming to be heard before the Lord Ordinary, his lordſhip, on the 20th of June 1720, "found, that it is to be "preſumed, that the ſecond mortification came in place of the "firſt, and that the firſt became thereby extinct, and declared "accordingly."

The reſpondents repreſented againſt this interlocutor, and the appellant having made anſwer, the Lord Ordinary reported the caſe to the Court, and their lordſhips, on the 7th of December 1720, "found that the two mortifications ſubſiſted as two ſeparate "donatives."

The appellant reclaimed againſt this interlocutor praying, amongſt other things, that ſince both deeds were found among the grantor's papers, after his deceaſe, and ſince they were both drawn and written by a learned gentleman at the bar, who was a witneſs to the execution of both, he might be at liberty to examine that gentleman and the other inſtrumentary witneſſes as to the directions given to the ſaid gentleman for preparing theſe deeds, and what declarations the grantor had made: and whether it was intended by the grantor that both ſhould ſubſiſt, or that the ſecond was to include the firſt, and that only ſubſiſt. After anſwers for the reſpondents, the Court, on the 23d of December 1720, "adhered "to the former interlocutor, and refuſed the deſire of the pe-"tition."

Entered, 13 Jan. 1720-1. The appeal was brought from "an interlocutory ſentence or "decree of the Lords of Seſſion of the 7th of December "1720, and the affirmance thereof of the 23d of the ſame "month."

Heads of the Appellant's Argument.

As the grantor has not in his laſt deed declared that both ſhould ſubſiſt, ſo it ſeems apparent that it was not his intention they ſhould. In both deeds there is contained the ſame recital without any variation; they are to have the ſame commencement, to be paid at the ſame terms, and differ in nothing but that the ſecond gives a larger ſalary, and appoints one boy more to be educated: therefore, as when the firſt was executed, the grantor intended only to have three boys educated, he appointed a proper maintenance for them, and a ſuitable encouragement to the ſchoolmaſter; ſo afterwards intending to add one boy more to be maintained, he,

he, by the ſecond deed, made an additional allowance for that boy's maintenance, and likewiſe gave to the ſchoolmaſter, an additional allowance for his trouble: but he cannot be thought to have intended ſeven boys to be educated. It ſeems a natural conſtruction that the laſt was intended to include, and be an addition to, the firſt.

Should there be any difficulty as to the conſtruction of theſe two deeds, and ſhould it appear uncertain what was the intention of the grantor, (which ought to be the rule of conſtruction in voluntary grants of this kind) the method propoſed by the appellant in his reclaiming petition was regular and proper. The gentleman, who by the grantor's directions drew both deeds, is alive; he wrote them both, and is an inſtrumentary witneſs to their execution; and he cannot, certainly, but know what the grantor declared to him in relation to theſe deeds, and what his intention was as to the ſubſiſting of both, or only of the laſt.

Whereas this day was appointed for hearing counſel ex parte upon this petition and appeal; and counſel appearing for the appellant, but no counſel for the reſpondents, and the appellant's counſel being heard and withdrawn, It is ordered and adjudged, that the ſaid interlocutor of the 7th of December laſt, finding the two mortifications ſubſiſted as two ſeparate donatives, and the interlocutor of the 23d of the ſame month, in affirmance thereof, be reverſed: and it is further ordered and adjudged, that the appellant be at liberty to examine the inſtrumentary witneſſes, according to his petition to the Lords of Seſſion for that purpoſe; and ſuch further proceeding ſhall thereupon be had before the Lords of Seſſion as to juſtice ſhall appertain. Judgment, 4 May 1721.

For Appellant. *Rob. Raymond. Will. Hamilton.*

Caſe 85. Janet Maxwell of Cowhill, and Charles Maxwell her Huſband, - - *Appellants;*

George Sharp of Hoddam, Advocate, Son and Heir of John Sharp of Hoddam, deceaſed, - - - - - *Reſpondent.*

Et e contra.

10 *May* 1721.

Judicial Factor.—A perſon who had become ſurety for a judicial factor, and afterwards had a depu'ation from him, could by no right acquired during the factory invert the heir's poſſeſſion: he could not retain poſſeſſion till his debts were paid, but muſt purſue for them as accords.

He is alſo found liable in terms of the act of ſederunt, 31 July 1690, in annual-rent for what he received or might have received within one year after the ſame grew due. He was entitled to no factor-fee, having diſturbed the poſſeſſion of the factor by virtue of other rights and titles in his own perſon.

Commiſſary Court.—This could not give decrees of preference among competing creditors.

Proceſs; Decree.—In a decree, a former decree being founded upon as the ground thereof, and ſuch former decree not pronounced, the ſecond decree was null.

Annual-rent.—Aliments to children were to be imputed to the rents of the years in which they were paid, and not deducted out of the annual-rents due by a factor.

Coſts and Expences.—In the above cauſe, the Court having refuſed expences, on a croſs appeal taken, their judgment is reverſed.

Theſe coſts aſcertained by a committee of the Houſe of Lords, at 640*l.* and ordered by the Houſe to be paid.

THE appellants in the original appeal, after their marriage in 1707, brought an action of count and reckoning and of removing, before the Court of Seſſion, againſt the late John Sharp of Hoddam, ſetting forth, inter alia, as the grounds thereof: That Dugald Maxwell of Cowhill, the appellant Janet's father, died in 1688 ſeiſed of an eſtate of 200*l.* ſterling per annum, or thereabout, leaving three daughters infants, of tender years, without having nominated tutors or curators to them; the appellant Janet being the eldeſt, to whom the eſtate was provided by her mother's contract of marriage: and on the petition of a relation, the Court of Seſſion in July that year appointed one John Maxwell of Middleby, factor, to receive the rents till tutors and curators were appointed; and he granted ſecurity to be accountable for his intromiſſions:

That John Sharp of Hoddam, the reſpondent's father, who lived in the neighbourhood, deviſed methods to make a prey of the appellant Janet's eſtate: her grandfather having obliged himſelf and his heirs to warrant a part of his eſtate, which he had ſold to one Roger Soſlaw, againſt a claim of multures, which the Earl of Southeſk claimed to have thereon, as heritor of a mill which the reſpondent's father had purchaſed for the earl: and reſpondent's

ondent's father thereupon, by colluſion with Soflaw, obtained ecree againſt him on the 21ſt of November 1690, for a ſum in ame of abſtracted multures; and thereupon Soflaw brought an ction for his relief againſt the appellant Janet, and her ſiſters the ifants, before the Commiſſary Court of Dumfries, of which the ſpondent's father was clerk: No defence was made on their art, and the claim being by the purſuer referred to the oath of ie defenders, who were minors, on their not appearing to depone, oflaw on the 16th of December 1690 obtained a decree againſt hem for about 217*l.* ſterling, and 8*l.* ſterling *per annum* afterwards: and of this decree the reſpondent's father took an aſſignment the ſame day it was pronounced, and afterwards obtained a decree of adjudication thereon, in abſence, before the Court of Seſſion againſt the whole eſtate:

That in September 1690 John Maxwell of Barfield, a relation, was appointed tutor, but Mr. Sharp being clerk on this, the tutor never granted any ſecurity: that Mr. Sharp having alſo purchaſed various debts, or pretended debts, of the appellant's father; in 1691 through his means a petition ſigned by the tutor, (who was largely indebted to him) by himſelf and various creditors was preſented to the Court of Seſſion, ſtating, that Middleby's factory was only to laſt till tutors ſhould be appointed, and praying that one John Macnaught ſhould be appointed in his room:

That Mr. Sharp granted ſecurity for this Macnaught; and a deputation was firſt granted to one Lanerk, and afterwards to Mr. Sharp himſelf:

That after this factory granted, Mr. Sharp got poſſeſſion of the eſtate on different titles acquired by him, among which Soflaw's decree for multures was one; and he continued to receive the whole rents till 1707.

The action concluded, that the reſpondent's father ſhould be decerned to quit the poſſeſſion, and that he ſhould account for his intromiſſions with the rents, ſince the death of the appellant Janet's father. The reſpondent's father in his defences, contended that Macnaught the factor, and not he who was only ſecurity for him, ſhould be firſt accountable for the rents; and that his poſſeſſion was to be aſcribed to the debts which he had acquired on the eſtate. The appellants in their anſwers, inſiſted upon a depoſition made by Macnaught in an action of the reſpondent's father againſt him, in which he ſwore, that his name was filled up in the factory without his knowledge, and that he never did intermeddle in the matter. The Court, on the 23d of December 1707 "Found the defender's factory proved, and that "the factor could by no right, acquired during the factory, invert "the heir's poſſeſſion; and ordained him to give up his poſſeſſion "to the purſuers, reſerving to him to purſue for his debts as ac"cords; and found the debts acquired during the factory, re"levant to be proved by writing or oath of the defender."

The reſpondent's father afterwards inſiſted upon two decrees of preference obtained againſt him by ſome of the creditors on the eſtate before the commiſſaries of Dumfries, and which he had after-

afterwards acquired right to: the appellants contended that the Commiſſary Court could not prefer one creditor to another. The Court on the 24th of January 1708 "Found that the commiſſa- "ries had committed iniquity by inverting the factor's title of "poſſeſſion, and found thoſe decrees null, and that the factor "muſt account for the rents, and cede the poſſeſſion pretended "by virtue of the rights he acquired during the factory." And on the 27th of February thereafter, the Court "allowed the pur- "ſuers to prove the rental, and the defender to prove the pay- "ments made by him or others, for whom he is to count to cre- "ditors, who had legal diligence affecting the eſtate." Nothing being proved on this head, the Court, on the 17th of June 1709, "circumduced the term for proving."

The reſpondent's father having quitted poſſeſſion, the action of count and reckoning proceeded, and by various interlocutors of 14th December 1710, 18th January 1711, and 19th June 1712, the defender was ordered to account, not only for the years of Macnaught's factory, but alſo for the years 1690 and 1691, the years of Middleby's factory, unleſs he ſhould prove the receipt of the rents by Middleby.

In the mean time the defender had claimed allowance of the ſum contained in the ſaid decree obtained at the inſtance of Soſlaw; the purſuers objected colluſion, and that Soſlaw's decree had been founded upon another alleged decree at the ſuit of the Earl of Southeſk, which was itſelf void. The Court, on the 26th of July 1711, "found the decree before the commiſſaries void, as "being founded on Lord Southeſk's decree not produced in "court:" and, on the 6th of November thereafter, "found the "decree ſo founded on null."

The reſpondent's father dying about this time, the appellants revived the action againſt the reſpondent his ſon, and inſiſted, that in terms of the act of ſederunt, 31ſt July 1690, directing factors appointed by the Court of Seſſion to be accountable for the annual rents of what they did or might have received within one year after the ſame grew due, therefore the reſpondent, as repreſenting his father, ſhould account in that manner: he contended, that this act of ſederunt was in deſuetude, and had never been reduced into practice; and that though it had been revived on the 22d of November 1711, and directed that mode to be obſerved in all time coming, that, being long after the expiration of the factory in the preſent caſe, could be no rule of accounting. The Court, on the 12th and 25th of February 1718, "found the de- "fender's father liable for annual rents in terms of the ſaid act "of ſederunt, and directed the clerk to make up the calculation "accordingly."

The reſpondent next claimed that his father ſhould be allowed deduction of a ſalary or factor's fee; but the Court, on the 4th of February 1719, "found that the defender's father, having "diſturbed and endeavoured to exclude Macnaught the factor, "for whom he was cautioner, and Lanerk the ſub-factor, by "virtue of other rights and titles in his own perſon, he or his "heirs

heirs ought to have no allowance of any ſalary or factor's fee." nd to this interlocutor the Court adhered on the 16th of July ereafter.

In making up the account between the parties, the appellants iſted that an aliment of 100*l.* Scots *per annum*, paid by the pondent's father to the appellant Janet and each of her ſiſters, uld be deducted out of the annual-rents of the rents, and not of the rents themſelves; but the Court, on the 14th of Fe-ary 1719, "found that the aliments were not to be imputed to he annual-rents of the rents of the eſtate of Cowhill, but were o be imputed and allowed out of the rents themſelves of heſe years, wherein they were reſpectively paid and diſ-harged."

The appellants afterwards petitioned the Court, that the de-der might be found liable in expences; but the Court, on the ſt of July 1720, "found the defender ought not to be liable to the purſuers for any expence in the proceſs." And to this terlocutor they adhered on the 26th of ſame month.

The original appeal was brought from "an interlocutor of the Lords of Seſſion of the 14th of February 1719, and another in-terlocutor of the 21ſt of July 1720, and the affirmance thereof on the 26th of the ſame month." Entered, 15 Dec. 1720.

And the croſs-appeal by George Sharp "from certain inter-locutors of the Lords of Seſſion, made on the behalf of the ſaid Charles Maxwell and his wife." Entered, 8 Feb. 1720-1.

On the Original Appeal.—Heads of the Appellants' Argument.

Coſts and expences of ſuit ought of courſe to be allowed to the prevailing party in all caſes; and much more in this caſe, where the appellant Janet hath by ſuch practices been kept out of her eſtate for ſeventeen years. The appellants have been forced to contract great debts, not only for the maintenance of them-ſelves and their family, but alſo for the carrying on this tedious nd chargeable proceſs; during the whole courſe of which they ave prevailed in *every* interlocutor, except only in theſe againſt he allowing them their coſts and expences; for which no other eaſon was given, but that the reſpondent's father had no factor's ee or ſalary, which had been ſo juſtly diſallowed. And though a ſalary had been allowed him, it would not have amounted to 50*l.* ſterling, a very inconſiderable ſum, if compared with the coſts nd expences of the action.

By the articles of regulation made by the Court of Seſſion in 1695, ratified by act of parliament, it is expreſsly provided that n all caſes were the Court ſhould find the defender to be litigi-ous, they ſhould take an account upon oath from the purſuer of he expences and damages he had been put to, and ſhould decern the ſame to be paid to him; and in caſe of extravagance, to mo-dify the ſaid expences and damages *more largely in time coming*, for he better preventing litigious ſuits.

The aliments ought to have been paid out of the annual rents, and not out of the rents themſelves; for by the law and univerſal rule

rule in accounting, aliments ought to be allowed out of the annual rents, and not out of the principal ſums, eſpecially as there were annual rents in the factor's hands at the time of the different payments of the aliments. Were it otherwiſe the annual rents would be a dead ſtock for a great number of years.

Heads of the Reſpondent's Argument thereon.

It is extraordinary in any event to inſiſt againſt the reſpondent for coſts, incurred in his father's lifetime. If there was any negligence in the management of the affairs, or if any thing unjuſtifiable was inſiſted upon by the reſpondent's father, that can import nothing againſt the reſpondent, who was nowiſe acceſſary to it; and the reſpondent, in the whole of the proceedings ſince the action was revived againſt him, inſiſted upon nothing but what was extremely juſtifiable, even ſuppoſing the judges determined rightly againſt him. The only thing inſiſted upon by the reſpondent in which he did not prevail, was, that he coming in place of the factor ſhould not be accountable in the ſtricteſt manner for the intereſt of money in the factor's hands annually; or if he were, that he might be allowed a factor's fee. To give coſts againſt him on that account were introducing a hardſhip without a precedent.

But the reſpondent's father had all the reaſon in the world to defend himſelf in this ſuit. The appellants charged him with the rents of 1688 and 1689 and downward; and the Court at firſt found him liable for 1692, and no higher; and though he was afterwards decerned to account for 1690 and 1691, yet there were ſtill two years overcharged. He was further charged with the payment of ſeveral ſums, which the Court found he was not to be charged with: the appellants in particular ſtated him as indebted 1000*l.* ſterling, as the value of wood cut by him, and after a long and expenſive proof, they made out nothing againſt him. Not only was he loaded with theſe unjuſt charges, but great part of the articles of his diſcharge, which were allowed by the Court, were ſtrenuouſly oppoſed and anxiouſly diſputed by the appellants. Upon the whole the appellant's charge was for near 70,000*l.* Scots, whereas at moſt not one-third was due.

The aliment paid to the heirs portioners being an annual burden upon the rents muſt be deducted out of the rents, for the factor can only account for the free rent, *annuis debitis deductis*; and as the factor, was by the factory itſelf, ſpecially obliged to pay theſe aliments, he could not warrantably employ the whole rents, without retaining ſufficient to anſwer the aliments, and if he was bound to retain, he muſt of conſequence be exempted from the intereſt of ſo much of the land rent as correſponds to that annuity.

On the Croſs Appeal.—Heads of the Appellant Sharp's Argument.

(The appellant in the croſs appeal enters into no argument on the interlocutors finding that his father as factor could not by any right acquired, during the factory, invert the poſſeſſion and finding the

e decree of the commiſſaries in January 1708, null; he ar-
es againſt accounting prior to the factory and againſt certain
erlocutors, finding the poſſeſſion of certain creditors not
oved: theſe being founded on ſpecial circumſtances are not here
ted.)

To oblige a factor to account by a rental, whether he receives
e rents or not, and for the value of thoſe rents annually, is no
ubt carrying things to great rigour. There is no foundation
r this but the act of ſederunt 1690; but this act was in *deſuetude*;
or can any inſtance be given, where a factor, upon the footing
that act, was obliged to account ſo rigorouſly. It is true the
t, was revived in 1711, but that was long after the expiration
the factory in queſtion: and this new act thought it ſo rea-
nable that every factor ſhould know what he obliges himſelf to,
at it is directed to be expreſsly mentioned in the ſecurity that
e factor is to account for intereſt annually. But that is not to
extended to a caſe, where there is no ſuch clauſe, and the con-
tion of the bond in the preſent caſe is only to make juſt count
d reckoning of the rents he ſhall receive, and pay the ſame as
e Court ſhall direct. Beſides, whatever might be ſaid againſt
e factor himſelf, this rigorous way of accounting can never be
tended to the cautioner, againſt whom obligations are to be
ictly interpreted.

For reverſing the interlocutors obliging the factor to account for the intereſt of the rents annually.

All factors are allowed a ſalary or factor's fee, and as Mr. Sharp's
ther accounted as factor, and that in ſo rigorous a manner,
ought at leaſt to have the ſame privileges as other factors. In-
ed the reaſon aſſigned for making a difference between this caſe
d others ſeems not very intelligible. The words are "that
Mr. Sharp's father had endeavoured to exclude Macnaught the
factor, for whom he was cautioner, and Lanark the ſubfactor,
from the poſſeſſion, by virtue of other rights and titles in his
own perſon, and therefore ought to have no factor's fee."
hen Mr. Sharp is to account, the factor and he are but one per-
; but when a ſalary is demanded, Macnaught is deemed a
ifferent perſon. The interlocutor in fact comes to this: Mr.
rp diſturbed himſelf and endeavoured to exclude himſelf from
poſſeſſion, *by poſſeſſing*; and therefore ought not to have a
ry. But the inſtances of that pretended diſturbance are
ling; for Mr. Sharp being a creditor, might no doubt, though
urity for the factor, complete his diligence, in order to eſtabliſh
preference in competition with other creditors. But ſince he
accounted rigorouſly as a factor, he ought to be allowed a
ry. No doubt the factor and ſubfactor expect a ſalary and will
account without being allowed one.

For reverſing the interlocutors refuſing a ſalary or factor's fee.

Heads of the Reſpondents' Argument thereon.

(The reſpondents follow the appellant in the croſs appeal on
ſe points mentioned to have been founded on ſpecial circum-
oces.)

It would have been very unreaſonable to have given Mr.
rp a ſalary for ruining the purſuers in their affairs, under

his management. The charging him with intereſt was in terms of the act of ſederunt made but a little before the date of the factory.

Judgment, 10 May 1721.

After hearing counſel, *It is ordered and adjudged that the croſs appeal of the ſaid George Sharp be diſmiſſed, and that the ſeveral interlocutors therein complained of be affirmed: and that ſo much of the original appeal as complains of the ſaid interlocutor of the* 14th *of February* 1719, *be diſmiſſed, and that the ſaid interlocutor be affirmed: and it is further ordered and adjudged that the ſaid interlocutor of the* 21ſt *of July* 1720, *whereby the Lords of Seſſion found Hoddam not to be liable to the appellants Maxwell and his wife, for any expence of the proceſs, and the affirmance thereof on the* 26th *of the ſame July be reverſed: and it is declared and adjudged, that the reſpondent Sharp is liable to the appellants Maxwell and his wife for the expences of the ſaid ſuit: and it is hereby further ordered and adjudged that the ſaid Lords of Seſſion do cauſe the expences and damages of the ſaid appellants in the ſaid ſuit to be taxed and aſcertained, according to the regulations in caſes where defendants are litigious, and the ſame when ſo aſcertained to be forthwith paid to the appellants by the ſaid George Sharp.*

For Charles Maxwell and his Wife, *Rob. Raymond. Tho. Kennedy.*

For George Sharp, - - *Ro. Dundas. C. Talbot. Will. Hamilton.*

Journal,

On the 7th of December 1722, a petition was preſented to the Houſe of Lords, for Charles Maxwell of Cowhill, and Janet his Wife, complaining "that the Lords of Seſſion in Scotland have "not cauſed the petitioners' expences and damages to be taxed "in the ſuit between the petitioners and George Sharp of Hod- "dam, advocate, purſuant to the order and judgment of the "Houſe of 10th May 1721." This petition was referred to a committee.

On the 23d of May 1723, the committee "report, that they "have conſidered the ſaid petition, to them referred, and in that "conſideration were attended by the parties on both ſides as alſo "their agents; and having conſidered, what was by them offered, "and likewiſe conſidered the regulations in caſes where defendants "are litigious, according to which the expences and damages of "the petitioners by the order and judgment of this Houſe above- "mentioned were directed to be taxed, the committee in the firſt "place were of opinion, that the petitioners were not entitled to "any allowance in reſpect of what was claimed for intereſt, for "their coſts ſuſtained in the Court of Seſſion, in the ſuits between "the petitioners, and the ſaid Mr. Sharp; nor likewiſe to any allow- "ance of coſts, in reſpect of their appeal to this Houſe; nor any "allowance for damages for loſs of time.

"The committee in the next place think proper to acquaint "your lordſhips that a copy of the petitioners' bill of coſts, which "was exhibited to the Lords of Seſſion, was laid before the com- "mittee, who proceeded to conſider the reſpective articles thereof with

with due regard to the direction contained in the ſaid order or judgment, on hearing the petitioners' appeal; and having gone "through the whole account, and heard as well the parties themſelves, as their agents, were further of opinion, in regard the "petitioners in divers particulars in their ſaid bill of coſts had "made extravagant demands, they ought not to be allowed any coſts "in reſpect of the taxation of their coſts: and their lordſhips in "going through the ſaid account, did adjuſt and aſcertain the coſts "they conceive right to have been allowed in reſpect of the ſeveral "articles charged by the petitioners, ſome of which were diſallowed "by the Lords of Seſſion, and others concerning which the ſaid "Lords had made no determination: and having done ſo, the "committee did then cauſe the ſeveral articles approved of to be "caſt up, which amount in the whole to the ſum of 640*l.* which "ſum the committee conceive the petitioners are entitled to, and "are of opinion the ſame ought to be forthwith paid to them by "the ſaid Mr. Sharp."

On the 24th of May 1723, this report was taken into conſideration by the Houſe and agreed to, and an order made accordingly in terms thereof, "that the ſaid George Sharp do forthwith pay, "or cauſe to be paid to the ſaid Charles Maxwell and Janet his "Wife the ſum of 640*l.* purſuant to the ſaid report."

Alexander Munro the younger of Auchinbowie, - - - - - - *Appellant;*

Grizel Bruce of Riddoch, - - - - *Reſpondent.*

Caſe 86.

17th *May* 1721.

Vis et metus.—A diſpoſition is granted by a woman to her heir at law, reſerving her own life-rent, and the courteſy of a future huſband, and declaring that it ſhould not affect the heirs of her own body, and is followed by a more formal diſpoſition a few days afterwards, on which infeftment followed: ſhe brings an action for reduction on the ground, that being under arreſt at London at the ſuit of a creditor, her heir had refuſed to bail her, unleſs ſhe executed the deed firſt mentioned, and the bailiff threatening to carry her to Newgate, ſhe gave her conſent, and executed the deed as ſoon as bail was granted, and before ſhe left the ſponging-houſe: The Court reduces the deed and all that followed thereon; but the judgment is reverſed.

THE reſpondent was proprietor of the eſtate of Riddoch and other lands in the county of Stirling, of conſiderable yearly value; and ſhe was alſo poſſeſſed of a conſiderable perſonal eſtate. Of theſe eſtates, ſhe had executed a voluntary and revocable ſettlement in favour of a perſon in Scotland, who was a diſtant relation, and to whom ſhe had alſo granted powers to receive her rents.

Being in London in 1714, ſhe was betrayed into a marriage with a perſon of the name of Colquhoun, who had been a ſer-

jeant in the Foot Guards, who gave himſelf out to be a man of a great eſtate, and who at ſame time was married to ſeveral other women.

The appellant, who ſtates himſelf to be heir at law to the reſpondent, mentions, that hearing of her misfortune, he went and viſited her, and in conſequence of an offer from him to do all he could to relieve her, a proſecution for bigamy was inſtituted againſt Colquhoun, in which the appellant was aiding to her both with his credit and his own perſonal ſervices: That the reſpondent thereupon declared her intention to make a ſettlement of her eſtate upon the appellant and his heirs, failing iſſue of her own body: That the factor in Scotland having declined to remit any money to the reſpondent, or to anſwer her bills, ſhe incurred ſeveral debts; and in May 1715, as ſhe and the appellant were in a coach together, ſhe was arreſted at the ſuit of one Cuer an attorney: That the appellant procured bail for the reſpondent and ſhe was ſet at liberty accordingly; and the appellant paid the expences of the reſpondent while ſhe remained in the ſpu ing-houſe: That the reſpondent propoſed inſtantly to exe the deed in the appellant's favour which ſhe formerly inte and to put it out of her power afterwards to do deeds to his judice; and ſuch deed was drawn and executed accordingly. this firſt deed not being written upon ſtamped paper, a ſec deed was drawn by Sir David Dalrymple, then Lord Advoc and this ſecond deed, after ſhe was admitted to bail and at free liberty, was read over to her, approved of and executed the preſence of Henry Cunninghame Eſq; a member of the H of Commons, Thomas Crawford of Lincoln's Inn, then atto for the reſpondent, and Thomas Buchanan, clerk to Sir D Dalrymple; and ſhe in the preſence of theſe witneſſes decl the ſaid deed to be exactly according to her intentions, and ſhe executed the ſame freely and voluntarily: That by this d which was in terms of the former one, the reſpondent conve her real eſtate to the appellant, her heir at law, and the heirs his body, whom failing, to the reſpondent's heirs whatſoever, reſerving her own life-rent of the premiſes, and with a power give any huſband ſhe ſhould marry the life-rent thereof; under proviſo that the iſſue of the reſpondent's body ſhould not be judiced thereby, but that they ſhould have full power and li to enjoy the ſame freely as if the ſaid right had never been and thereupon the appellant was infeft: That after the exec of this deed the appellant continued about two months in don in perfect friendſhip with the reſpondent, aſſiſted her in ſecuting the ſaid Colquhoun, and furniſhed her with ſeveral of money for that purpoſe; and accordingly judgment was tained againſt him, and he was burnt in the hand.

The reſpondent afterwards brought an action againſt the a lant before the Court of Seſſion, to have the diſpoſition ſet and declared void, on the ground that the ſame had been obt by concuſſion, and that ſhe had been compelled to execute ſame *vi et metu*.

An act and commiſſion being granted to examine witneſſes in England, witneſſes were accordingly examined, and it appeared by the evidence of two of the inſtrumentary witneſſes, that the deed in queſtion was all read over to the reſpondent, ſeveral clauſes were read a ſecond time, and ſhe approved thereof and executed the ſame, and declared ſhe did it voluntarily and willingly, and that ſhe delivered the ſame to the appellant in their preſence; all which was after the bail-bond given, the bailiff paid his fees, and ſhe declared at liberty; that nothing of force or conſtraint was uſed, but every thing tranſacted according to her own directions, and with her approbation. The appellant's witneſſes ſwore that ſhe was in the bailiff's houſe at the time of executing the deed in queſtion; that the appellant refuſed to procure her to be bailed, or to give her any money, unleſs ſhe would execute the ſaid deed; and that the bailiff threatened to carry her to Newgate, and that they believed the ſame was executed through fear. Theſe depoſitions related ſolely to the deed firſt executed.

The Court, on the 8th of July 1720, having conſidered the ſtate of the proceſs, and writs produced, and teſtimonies of the witneſſes aduced, and having adviſed the ſame with the debate, they, by a majority of one vote, "found the reaſon of reduction, "viz. that the diſpoſition quarrelled was elicited from the reſpondent by concuſſion is relevant and proved, and therefore reduced the ſaid diſpoſition, with all that had followed thereupon:" and to this interlocutor the Court adhered on the 13th of January 1721.

The appeal was brought from "an interlocutory ſentence or decree of the Lords of Seſſion in Scotland of the 8th of July 1720, whereby they found that the diſpoſition quarrelled was elicited from the reſpondent by concuſſion, was relevant and proved, and therefore reduced the ſaid diſpoſition with all that followed thereupon; and alſo from another interlocutor of the ſaid Lords, of the 13th of January 1721, affirming the former interlocutor." Entered, 18 Feb. 1720-1.

Heads of the Appellant's Argument.

There is no concuſſion proved in this caſe; for where a deed is queſtioned upon pretence of concuſſion, one of two things ought to be proved; either that the reſtraint and compulſion were impoſed by the perſon to whom the deed was granted; or that, though it were impoſed by another perſon, yet it was in view and in order to extort the deed: but neither of theſe is found in this caſe. Though the reſpondent was in cuſtody of a bailiff, yet that was not at the ſuit, nor by the procurement of the appellant, the grantee. It is not attempted to be proved that the appellant was in any concert with the perſon who arreſted her, or that he ever ſaw him; and the bailiff himſelf ſwears, that it was at the ſuit of one Cuerton; that he never ſaw nor knew any thing of the appellant, till he ſaw him in the coach with the reſpondent when ſhe was arreſted. There is not the leaſt pretence, that the reſpondent

ſpondent was impriſoned with any view to compel her to execute this deed. No doubt a perſon in cuſtody may execute deeds to a third party, and thoſe deeds will ſubſiſt though they were in cuſtody; eſpecially in a caſe where the impriſonment was not at the ſuit of the appellant, nor of any perſon in concert with him.

The moſt that was pretended againſt the appellant was, that he would not interpoſe to relieve her from reſtraint and procure her bail, unleſs ſuch deed was granted. Surely this was no concuſſion in the appellant, in order to have a deed executed that is natural right of ſucceſſion ſhould not be ſet aſide by poſterior, rath and unneceſſary deeds; nor was it extortion in the appellant, that he would not interpoſe his credit for a perſon of a pretty inconſtant temper, unleſs ſhe would give ſome reaſonable ſecurity not to evacuate the appellant's right of ſucceſſion. There can be no extortion, but where there is ſome poſitive fact, done by the extorter, impoſing the fear: but refuſing to do, to interpoſe credit, or grant any other favour, was no extortion.

The deed itſelf was a rational deed, being a ſettlement of the eſtate upon the appellant her right heir, upon failure of iſſue of her own body: the life-rent of the whole was reſerved to her; her future huſband was ſafe as to his courteſy, and the iſſue of her body as to the eſtate. So that the only bar put upon the reſpondent was a ſtop to importunities upon her to ſettle the eſtate from the right heir, and prevent her from diſinheriting the appellant.

This deed was executed willingly and freely, and ſo the reſpondent declared to the two inſtrumentary witneſſes, and likewiſe to the gentleman who was bail for her. Had ſhe been under any force, it is moſt probable ſhe would then have declared it, that gentlemen of character, as they were, might have relieved her from that force. But in fact, ſhe was at liberty when the when the deed was executed; the bail-bond was given, the bailiff paid his fees, and ſhe declared to be at liberty. So, had ſhe been under any conſtraint, that was at an end before the deed was ſigned.

All the depoſitions of the witneſſes for the reſpondent reſpecting the appellant's refuſing his aſſiſtance to her, unleſs ſhe executed a deed, relate to the firſt deed, and not to the ſecond, which is the deed in queſtion. And, ſuppoſing and undue methods had been uſed to procure the firſt (which is poſitively denied,) there is no inference that it was ſo with regard to the ſecond; nor is there any proof of it.

(The reſpondent's caſe contains no argument whatever on her part; ſhe merely ſtates the circumſtances of the caſe, with regard to the firſt deed.)

Judgment, 17 May 1721.

After hearing counſel, *It is ordered and adjudged, that the ſaid interlocutor of the* 8th *of July* 1720, *and the ſaid interlocutor of the* 13th *of January in affirmance thereof, be reverſed.*

For Appellant, *Ro. Dundas. Tho. Kennedy. Will. Hamilton.*
For Reſpondent, *Rob. Raymond. C. Talbot.*

In

In the appellant's caſe, ſeveral interlocutors of the Court are ſtated as to the admiſſibility of female witneſſes, to other facts than thoſe within doors, and in their own houſes; and as to the allowing of objections to the characters of witneſſes: he alſo uſes argument thereon, but theſe formed no part of the judgment appealed from.

Dr. George Middleton, - - - *Appellant;* Caſe 87.
Mr. George Chalmers, Principal, and the reſt of the Maſters and Regents of King's College, Aberdeen, - - - *Reſpondents.*

9th *June* 1721.

Arbitration.—On a day appointed by two arbitrators for determining a matter, one of them declined to act, and the overſman thereupon pronounced an award; the Court having reduced this award as incompetent, the judgment is reverſed.

THE appellant, who had been for many years principal of King's College, Aberdeen, was in 1716, among others, ſuperſeded by certain perſons having his majeſty's commiſſion under the great ſeal of Scotland, to viſit that univerſity; and the reſpondent Chalmers was appointed to his place.

It being ſtated to theſe commiſſioners, that the appellant had received and had not accounted for certain ſums of money, ariſing from a mortification, or grant of his late majeſty King William, and for the *Bibliotheck money*, which laſt conſiſted of ſmall ſums payable towards the college library, by thoſe on whom the degree of maſter of arts was conferred, the commiſſioners directed the reſpondents to ſue the appellant for the ſame.

An action was thereupon commenced, but inſtead of proceeding therein, on the 5th of October 1719, a ſubmiſſion was entered into between the appellant and the reſpondents, for referring the matters in diſpute to the arbitration of Sir Alexander Bannerman, of Elſick, on the part of the appellant, and of Thomas Forbes, of Echt, on the part of the reſpondents, and in caſe of variance or diſcrepance between the arbiters, to Colonel John Buchan, of Cairnbulg, as overſman or umpire, elected and choſen by both parties: by this ſubmiſſion the parties were bound to ſtand to the decree to be pronounced under the penalty of 500 merks, and ſuch decree was to be made on or before the 8th of November 1719.

The reſpondents gave in their charge againſt the appellant, to which the appellant gave in his anſwers, and both parties having been ſeveral times heard before the arbiters and the overſman, the arbiters appointed the 28th of October 1719, for pronouncing their

their decree. When this day arrived, Sir Alexander Bannerman declared his opinion, that the appellant ſhould be abſolved from the claim given in by the reſpondents; but Mr. Forbes declining to pronounce any decree, the appellant by his procurator thereupon took a proteſt in the hands of a notary under form of inſtrument; and the overſman being preſent, in conſequence of what paſſed between the arbiters, appointed the next day for giving his judgment. Accordingly on the 29th of October, Colonel Buchan, the overſman, pronounced a judgment, finding and declaring that the appellant had managed the money belonging to the ſaid mortification and library, honeſtly and faithfully, and that he had accounted for, and made payment and ſatisfaction to the maſter and members of the ſaid college, of all the money he had received, and that there was no balance due to them from the appellant, and therefore abſolved him from the ſaid claim.

Of this judgment the reſpondents brought a reduction before the Court of Seſſion, in which they inſiſted, that being only truſtees, they could not properly ſubmit theſe matters, which were the property of their college, to arbitration, eſpecially ſince they had directions from the commiſſioners of viſitation to ſue the appellant at law; and that though they had power to ſubmit, yet the judgment was not regularly pronounced, for though one of the arbiters did not at that time incline to pronounce an award, yet he might have done ſo afterwards, and his declining was not any authority to the overſman to pronounce his decree. After a report from the Lord Ordinary, the Court on the 26th of January 1721, "found that the arbiters not having differed in their "opinion as to their determining in the foreſaid ſubmiſſion, but "only one of the arbiters declining to determine, the overſman "was not thereby empowered to pronounce his decree, and "therefore found his decree null, and decerned in the reduc-"tion." And to this interlocutor the Court adhered on the 3d of February thereafter.

Entered, 17 March 1720-1.

The appeal was brought from "an interlocutory ſentence or "decree of the Lords of Seſſion of the 26th of January 1721, "and alſo from another interlocutor of the 3d of February there-"after affirming their former interlocutor."

Heads of the Appellant's Argument.

The arbitrator named on the part of the reſpondents having declared his diſagreement with the other abitrator, and a proteſt under form of inſtrument having been taken thereon, the matter became legally and formally ſubjected to the cognizance of the overſman, and there was no occaſion for a new reference by the arbitrators to him. His being preſent and fully appriſed of the matters in controverſy, were ſufficient to warrant what he did therein, and his decree muſt ſtand good in law. By the regulation act 1695, ratified by act of parliament, no decree arbitral can be reduced, but upon proof of corruption, bribery, or falſehood; nothing of either of which is pretended in the preſent caſe.

Heads

Heads of the Reſpondents' Argument.

The overſman could not legally determine unleſs the matter had been remitted to him by the two arbitrators ſigning a reference, and mentioning their difference. For though the arbitrators might not agree upon an award on the 28th of October, when the appellant's ſon deſired them to pronounce it, yet they might afterwards have agreed before the 8th of November, the time limited for pronouncing their decree. The difference of arbitrators can never be conſidered to be final, nor can the fact which empowers the overſman to determine be otherwiſe aſcertained, than by a formal deed of the arbitrators declaring their difference: it were otherwiſe in the power of an overſman to take the determination upon himſelf when he pleaſed. The appellant, beſides, had a remedy to compel the arbitrators either to pronounce an award, or to remit to the overſman. The decree of the overſman proceeds upon the recital, that the arbitrators met and differed; but of this there is no legal voucher, and there is ſome appearance of colluſion from the good underſtanding which appears between the overſman and the arbitrator on the part of the appellant.

After hearing counſel, *It is ordered and adjudged, that the interlocutor of the* 26th *of January, and the interlocutor of the* 3d *of February* 1721, *in affirmance thereof, be reverſed.* Judgment, 9 June 1721.

For Appellant, *Tho. Kennedy. Sam. Mead.*
For Reſpondents, *C. Talbot. Will. Hamilton.*

In the appeal caſes on both ſides, the queſtion is agitated if the reſpondents had power to ſubmit this matter to arbitration; but as there was no croſs appeal, this matter was not before the Houſe of Lords, and the argument thereon is not here ſtated.

Case 88. John Robertſon of Goodlyburn, a Pauper, *Appellant;*
George Earl of Kinnoul, - - - *Reſpondent.*

5th *July* 1721.

Proceſs.—Act and Commiſſion.—A purſuer oppoſes the granting an act and commiſſion for examining the defender, a peer in London, in a matter referred to his oath, on the ground that he being old and poor, could not follow the examination: but the commiſſion is granted notwithſtanding.

Truſt.—A perſon executes an abſolute ſurrender of his feu, in favour of his ſuperior's ſon, but alleging qualifications of truſt in a ſeparate verbal agreement, the ſuperior ſwears that he remembers no term of depoſitation, and the ſon, the grantee, ſwears, that he perſonally gave no conſideration for the deed, and that it was not delivered to him, but that every thing was tranſacted by his father; and he never heard of any conditions or truſt: it is found that the depoſitions did not ſupport the allegations of truſt.

AFTER the determination and judgment given in the former appeal, (No. 63 of this Collection), whereby the Houſe of Lords reverſed the "interlocutors complained of, as to ſo "much thereof whereby probation by the oath of the reſpond- "ent had been refuſed to the appellant, or which was grounded "upon ſuch refuſal, or pronounced or made in conſequence "thereof; and further ordered ſuch probation to be admitted, and "that after examination of the reſpondent upon oath, the Lords of "Seſſion ſhould proceed and decree thereupon as ſhould be juſt;" the appellant preſented a petition to the Court of Seſſion, praying them to ſummon the reſpondent before them to take his oath: his counſel, however, having moved their lordſhips for a commiſſion to examine the reſpondent in England, the appellant preſented another petition, ſetting forth that though ſuch commiſſions were often granted with conſent of parties, yet that no law could force him to conſent; and that the appellant was an old man and ſo reduced in his means, that he was not able to follow ſuch a commiſſion, where his preſence would be neceſſary, his all being therein at ſtake. But the Court, on the 28th of July 1720, "ordained the reſpondent to depone before the Ordinary, if he "ſhould happen to come to Edinburgh during the vacation; if "not, they granted a commiſſion to take the reſpondent's oath at "London." And upon the 25th of November 1720, the commiſſion was renewed upon the reſpondent's petition.

Interrogatories being ſettled by the Court, the appellant was examined thereon by a commiſſioner at London. The import of his depoſition was, that the reſpondent acknowledged, that the appellant never delivered the deed of reſignation to him the reſpondent in whoſe favour it was conceived, and that the reſpondent never gave the appellant any conſideration for the ſame. That he knew nothing of any conditions upon which the ſaid deed of reſignation was delivered; nor did he ever hear from the late Earl of Kinnoul, Sir Patrick Murray, or any other perſon whatever,

whatever, of any conditions upon which the ſaid reſignation was given; and had heard and verily believed that the conditions inſiſted upon by the appellant were referred to the oath of the ſaid late Earl, and that he depoſed *negative* thereto.

On the 24th of February 1721, the Court "found and declared, that the depoſitions did not prove the allegations made "made by the appellant, and therefore adhered to their former "interlocutors in the removing." The appellant reclaimed, inſiſting that the reſpondent ſhould be decerned to account for the loſſes the appellant ſuſtained, by his being diſpoſſeſſed of the premiſes; but the Court, on the 28th of February 1721, "adhered to their former interlocutor, without prejudice to the "appellant to raiſe, proſecute, and inſiſt in any proper action "againſt the reſpondent for his intromiſſion with the appellant's "goods, or any damages done to the appellant by diſpoſſeſſing "him or otherwiſe, as accords."

The appeal was brought from "two interlocutory ſentences "or decrees of the Lords of Seſſion of the 23th of July, and 25th "of November 1720 and the affirmance thereof made the 24th "and 28th day of February 1721. (*a*) Entered 17 May 1721.

Heads of the Appellant's Argument.

As no deed could diveſt the appellant of the right and title to his eſtate, or convey the ſame to the reſpondent, unleſs it had been delivered to him by the appellant (which the reſpondent never pretended to prove was done, but only would have it preſumed to have been done, becauſe it is now in his power,) the appellant having fully taken off that preſumption, by the reſpondent's own acknowledgment upon oath, he conceives there can remain no further difficulty in this affair. And as the delivery of deeds is abſolutely neceſſary for altering property, ſo both law and equity require a valuable conſideration for the conveyance, (except where the deed itſelf bears to be made for love and favour;) and the reſpondent in his depoſitions has likewiſe moſt honourably acknowledged, that he never paid one ſixpence for the eſtate, and that he knows not, that any thing was paid for it by any other perſon.

The appellant conceives it would be hard above meaſure to proceed to other preſumptions, viz., that the ſaid deed was delivered to the reſpondent's father, and the price of the eſtate paid by him for the reſpondent's uſe, without any further proof; for by that rule, if an obligee in a bond ſhould execute a diſcharge *ſpe numerandæ pecuniæ*, which ſhould by any accident fall into the hands of a ſtranger, it would be in the power of that ſtranger, by giving that releaſe to the obligor, to releaſe him effectually, and put the obligor paſt relief, which juſtice cannot allow: The reſpondent therefore, before he can reap any benefit from the ſaid deed, muſt prove not only the delivering of it to his

(*a*) Theſe two laſt interlocutors are not mere affirmances of the two former, but on the merits; whereas the others are merely on the form of proceſs: but ſo it ſtands in the Journals.

father

father for his uſe, but likewiſe that his father paid the conſideration thereof.

It was contended by the reſpondent, that as the appellant had acknowledged, that there might be, when the decree of removing was paſſed, ſome of the feu duties in arrear, ſo that the ſaid decree, though only *ex parte*, being grounded upon ſome real debt, though not equivalent to the value of the eſtate, was capable of being confirmed by the ſubſequent voluntary ſurrender; and thus that the ſaid decree ought to be looked upon as the valuable conſideration of the deed.

Two cyphers put together are of no greater value than any one of them was before; a void deed can never ſupport a void decree. But theſe arrears of feu duties were inconſiderable, and tendered before the decree of removing.

Heads of the Reſpondent's Argument.

It is the conſtant practice of the Court of Seſſion to grant commiſſions to examine parties upon oath, eſpecially if out of the kingdom: and the reſpondent was at that time attending the ſervice of Parliament, and was examined by a commiſſioner named by the appellant.

The reſpondent does indeed ſwear, that the deed was not delivered to him by the appellant, nor did he give any valuable conſideration for the ſame; but then he adds the reaſon, that the whole was tranſacted by the late Earl of Kinnoul, his father; to him the deed was delivered, and no doubt there was a conſideration given by him; and it is plain from the depoſition of the late Earl of Kinnoul, that the ſame was delivered without any condition. And the appellant likewiſe brought an action againſt Sir Patrick Murray, inſiſting that the deed was depoſited with him upon truſt, not to be given up but upon performance of the conditions before mentioned; and Sir Patrick being examined upon oath, ſwore that the ſaid deed was never depoſited in his hands, and ſo there could be no truſt repoſed in him; and accordingly the Court, on the 24th of February 1721, aſſoilzied the ſaid Sir Patrick from the appellant's action.

The appellant likewiſe inſiſted that one Mercer, the reſpondent's agent in Scotland, might be examined how he came by the ſaid deed; and whether he knew or had heard of any and what conditions, upon which the ſame had been depoſited: and Mr. Mercer being examined ſwore, that the ſaid deed was ſent to him by the late Earl of Kinnoul to be made uſe of in the action of removing at the ſuit of the reſpondent againſt the appellant, and had heard that the ſame was delivered by the appellant to the ſaid late earl; and that he never heard from the ſaid late earl, or any other perſon, of any conditions, upon which the ſaid deed was granted and depoſited, except what was inſiſted upon by the appellant in his pleadings.

The reſpondent's father obtained a decree againſt the appellant in 1707, voiding his right; the appellant continued to poſſeſs the premiſes after that as a tenant at will, and paid the rent for the

ſame;

ſame; the appellant in 1713 executed a renunciation of all the title and intereſt he had to theſe premiſes, and that renunciation was abſolute without any condition; the appellant after that time has poſſeſſed as a tenant at will, and run greatly in arrear, which obliged the reſpondent to bring his action of removing againſt him, whereupon he recovered judgment; the reſpondent has been for ſeveral years kept in law ſuits by the appellant a pauper, and will in all events be a very great loſer.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutory ſentences or decrees therein complained of be affirmed.* Judgment, 5 July 1721.

The Appellants' Caſe is ſigned by himſelf.
For Reſpondent. *Rob. Raymond. Will. Hamilton.*

Ex parte

David Falconer, of Newtown, Eſq. - *Appellant;* Caſe 89.
The Principal and Maſters of King's College, and the Provoſt, Baillies and Council of Aberdeen, - - - - *Reſpondents.*

31ſt *Jan.* 1721-2.

Preſumption.—Two deeds of mortification in favour of the ſame perſons, but of different dates, and for different ſums, found in the grantors repoſitories, did not both ſubſiſt.
A proof of his intention allowed by the inſtrumentary witneſſes.

THIS appeal was upon a point preciſely ſimilar to the other appeal at the inſtance of the ſame appellant, (No. 84 of this Collection). In addition to the two deeds in the former appeal recited, relative to the education of the ſcholars at the ſchool of Conveth; the late Sir Alexander Falconer of Glenfarquhar, executed two others for maintaining and educating certain boys at the King's College of Aberdeen.

On the 3d of December 1712, Sir Alexander Falconer, by a deed upon the ſame recital with the firſt deed in the former appeal recited, left, mortified, and appointed 180*l.* Scots, payable yearly by his heirs out of certain lands, to the principal and maſters of King's College Aberdeen, for educating and maintaining three boys at the rate of 60*l.* Scots each yearly, at the Philoſophy College there; which boys ſhould be ſufficiently qualified, and be of the name of Falconer, in the firſt place, if any ſuch there were, and in default of them, of any other boys duly qualified, that ſhould be born or educated within the pariſh of Conveth; the firſt payment to be at the firſt term of Whitſunday, or Martinmas after his deceaſe. The patrons and preſenters were the ſame as in the former

former deed, namely his heirs and ſucceſſors of the name of Falconer.

On the 7th of Auguſt 1716, Sir Alexander executed another deed upon the ſame recital as in the former, whereby he left and mortified 342*l.* Scots, payable out of the ſame lands, in the ſame manner and at the ſame terms with the former, to the Provoſt, Baillies and Council of Aberdeen, for maintaining at the ſaid King's College, four boys of the name of Falconer, if any ſuch there were, and in default of ſuch, any other boys that ſhould be born or educated within the pariſh, or at the ſchool of Conveth; adding a clauſe not contained in the former, "that for the ſecurity "of his heirs, the truſtees ſhould report the boys' diſcharges to "the patrons and preſenters within a year and a day after they "ſhould receive ſuch year's allowance;" and a proviſo, "that "in caſe of variance between the patrons and the ſaid magiſtrates, the firſt miniſter ſerving the cure for the time at the "church of Aberdeen, and the miniſter of Conveth, were to "decide and determine the ſame."

Neither of theſe deeds were delivered, but found, with the two others in the former appeal mentioned, in the repoſitories of the deceaſed at the time of his death. The reſpondents brought an action alſo againſt the appellant, the heir of Sir Alexander Falconer, deceaſed, for payment of the ſeveral ſums contained in both the aforeſaid deeds. The appellant made defences, and the Court, on the 29th of December 1719, "found both the mortifi-"cations made by the ſaid Sir Alexander Falconer, of Glenſar-"quhar, in favour of the College of Aberdeen, to ſubſiſt."

The appellant reclaimed, and by his petition, amongſt other things, prayed leave, as in the former caſe, to examine the inſtrumentary witneſſes; but the Court, on the 15th of January 1721, "adhered to their former interlocutor, and refuſed the deſire of "the petition."

Entered 31 October 1721.

The appeal was brought from "an interlocutory ſentence or "decree of the Lords of Seſſion of the 29th of December 1719, "and the affirmance thereof the 15th of January following."

His argument was the ſame as in the former appeal.

Judgment. 31 Jan. 1721-2.

Whereas this day was appointed for hearing Counſel ex parte *upon this petition and appeal, counſel appearing for the appellant, but no counſel for the reſpondents, and the appellant's counſel being heard and withdrawn: and the order and judgment of this Houſe of the 4th of May laſt, on the appeal wherein the ſaid David Falconer was appellant, and others were reſpondents, being read;*

It is ordered and adjudged, that the ſaid interlocutor of the 29th of December 1719, finding the two mortifications ſubſiſted as two ſeparate donatives, and the interlocutor of the 15th of January following, in affirmance thereof, be reverſed: and it is further ordered and adjudged, that the appellant be at liberty to examine the inſtrumentary witneſſes according to his petition to the Lords of Seſſion for that purpoſe, reſerving to the Principal and Maſters of King's College of Aberdeen, and the Provoſt, Baillies, and Council of the ſaid City of Aberdeen, all de-

fences, competent in law, againſt the witneſſes; and ſuch further proceedings ſhall thereupon be had before the Lords of Seſſion as to juſtice ſhall appertain.

For Appellant, *Rob. Raymond. Will. Hamilton.*

John Allardice, Merchant in Campvere, *Appellant*; Caſe 90.
Jane Smart, Widow and Executrix of the Appellant's Father, for herſelf and her Children, - - - - - - *Reſpondent.*

12th *Feb.* 1721-2.

Proviſions to Heirs and Children.—A ſpecial proviſion, in a marriage contract, of ſums of money to be laid out on land or other good ſecurity, and alſo of conqueſt in lands, heritages, fiſhings, debts, ſums of money and others, to the *heirs* of the marriage, went to all the children, and not to the eldeſt ſingly.

A diſcharge of proviſions granted by two children to their father, in conſideration of a certain ſum of money, paid to them, operated in his favour with regard to the remainder of their proviſions, and not in favour of another child, who did not diſcharge.

Fiar.—A houſe, part of the conqueſt of a firſt marriage, is diſponed to a perſon and his wife in conjunct fee and life-rent, and to the bairns of the marriage in fee, whom failing, to the heirs of the huſband: the huſband being fiar might ſettle the life-rent thereof on a ſecond wife.

BY contract of marriage in September 1683 between John Allardice, Merchant in Aberdeen, and Agnes Mercer his firſt wife, the appellant's father and mother both now deceaſed, the ſaid John Allardice obliged himſelf to lay out 3000 merks Scots of his own money, together with the like ſum he was to receive with his wife as her portion, upon land, or other good ſecurity, and to ſettle the ſame upon himſelf and the ſaid Agnes Mercer, in conjunct fee and life-rent of the longeſt liver of them two, and the *heirs* to be lawfully procreate between them; whom failing, to the ſaid John Allardice, his heirs, executors, and aſſignees. The contract contained this proviſo, "that whatſoever "lands, heritages, fiſhings, debts, ſums of money and others, it "ſhall happen either of the ſaid parties to conquer, acquire, or "ſucceed to, during the time of the ſaid marriage, the *heirs* of "the marriage ſhall ſucceed thereto *in integrum.*"

In 1684, after the marriage had taken effect, John Allardice, the appellant's grandfather, by diſpoſition, conveyed a houſe and its pertinents in Aberdeen, to the ſaid John Allardice the father, and the ſaid Agnes his ſpouſe, in conjunct fee and life-rent to the longeſt liver of them two, and to the *bairns* lawfully begotten, or to be begotten, between them in fee; whom failing, to the heirs of John the father.

In 1700 the appellant's mother Agnes died, leaving iſſue the appellant and two daughters, the children of that firſt marriage. And at this time the father's free ſtock amounted to about 18000*l.* Scots,

Scots, beſides the ſaid houſe and pertinents in Aberdeen, v
his books at 5210*l.* 16*s.* 9*d.* Scots, and all his houſehold g

In January 1703 a contract of marriage was entered i
tween the appellant's father and the reſpondent Jane his
wife, by which he obliged himſelf to lay out 15000 merk
own money, together with the ſum of 7000 merks he
receive as the ſaid Jane's portion, upon land or other goo
rity, and to ſettle the ſame upon himſelf and the ſaid Jane
junct fee and life-rent, and to the children to be procre
the marriage in fee, whom failing, to be the heirs, execut
aſſignees of the huſband; and he likewiſe obliged himſelf t
the wife in the ſaid houſe in Aberdeen in life-rent dur
widowhood, in caſe ſhe ſhould ſurvive him, which he oblig
ſelf to warrant; but it was provided, that if the reſpondent
after his death be evicted thereout, ſhe ſhould be allowe
Scots yearly for the rent of any other houſe ſhe ſhould th
to take.

The appellant, being bred a merchant, was ſettled at Ca
and his father gave him an advancement to a conſiderable a
The two daughters of the firſt marriage were marrie
father's life-time, and he gave each of them 4000 merks
portions; and the daughters, by their contracts of marri
charged him of all proviſions they could reſpectively c
their mother's marriage contract or otherwiſe howſoever.

The appellant's father died in May 1718, leaving the r
ent, his widow, and nine children, four ſons and five daug
the ſecond marriage. By his will, and a codicil thereto, h
his wife, the reſpondent Jane, ſole executrix and univer
tee, with the burden of payment of 6000 merks to eac
four ſons, and 4000 merks to each of the five daughter
ſecond marriage, and of ſome ſmall legacies to the childre
firſt marriage. After his father's death, the appellant
noſced heir to him in the aforeſaid houſe and premiſes i
deen, and infeft. Beſides that houſe and premiſes, an
hold goods, the deceaſed left about 39,535*l.* 1*s.* 6*d.* Scot
ſonal eſtate, including heirſhip moveables.

Soon after his father's death the appellant brought a
before the Court of Seſſion againſt the reſpondent, for
of the 18,000*l.* Scots, being, as he ſtated, his father's
the diſſolution of the firſt marriage, after deduction of t
merks paid to his two ſiſters, and for recovery of the ſa
in Aberdeen, as being *conqueſt* of the firſt marriage, and
to the heir thereof, and to have the ſame freed of the r
ent's life-rent. The reſpondent made defences, and the
being debated before the Lord Ordinary, who reported t
to the Court, their lordſhips, on the 16th of Februar
"found that the heirs of the firſt marriage have right to
"*conqueſt* during that marriage, in regard that at the
"their mother's death, there was a ſufficient fund to an
"proviſions in both contracts of marriage; and found
"p

proviſions in favour of the heirs of the firſt marriage are to be underſtood in favour of the children of the marriage; of whom there being three in number, and two of them having accepted of ſpecial ſums from the father, in ſatisfaction of all they could claim by virtue of the ſaid contract; therefore the appellant was only entitled to claim a third ſhare of theſe proviſions; and found that the proviſions in the ſecond contract of marriage are rational and ſuitable proviſions; and found that the relict has right to the life-rent of the houſe provided to her by the contract of marriage with her huſband, who was fiar."

The appellant reclaimed, and after anſwers for the reſpondent, id a hearing, the Court, on the 14th of July 1720, "found that two daughters of the firſt marriage having accepted of proviſions in their contracts of marriage, in ſatisfaction of all that could fall to them by their mother's contract; which proviſion being leſs than would have fallen to them as two of three children of the firſt marriage, ſuppoſing that all the children of that marriage were entitled to an equal ſhare the ſurperplus of the two-thirds more than the proviſions received did not accreſce to the ſon of the ſaid marriage but was at the father's free diſpoſal; and before anſwer to the debate, whether the proviſions in the firſt contract in favour of the *heirs* of that marriage, did entitle the ſon of that marriage to the ſucceſſion thereof, excluſive of his two ſiſters, or if the three children had an equal intereſt, ordained the records of retours in the Chancery to be inſpected, and that either party might have acceſs thereto, that it might appear, whether in the caſe of proviſions of ſums of money, or other moveables in favour of the heirs of a marriage, the eldeſt ſon of that marriage be not uſually and uniformly retoured heir of proviſion of the marriage, excluſive of daughters, or younger ſons; or if uſually, or in any caſe, more ſons and daughters of a marriage are found to be retoured heirs of proviſion, by a virtue of a contract of marriage conceived in the terms aforeſaid; and that the directors of the Chancery ſhould certify what appeared thereon; and found that the clauſe of acquiſition in the deceaſed's firſt contract comprehended goods, merchandize and gear; and alſo found that the ſpecial ſum provided to the children of the ſecond marriage, is in the firſt place to be taken out of the acquiſition during that marriage, and that the ſame does affect the acquiſition of the firſt, in caſe, and in ſo far only as the aquiſition of the ſecond marriage falls ſhort of ſatisfying the ſame.

The parties thereupon procured certificates from the deputy-rector of Chancery, the firſt of which, obtained by the appellant, ted the 18th of July 1720, "certified after inſpection of the regiſter of retours he found that the eldeſt ſon of a marriage is uſually and uniformly retoured as heir of proviſion of the marriage, and that ſolely and no other perſon joined with him; and that in no caſe did it occur therein, that more ſons and daughters of a marriage are retoured heirs of proviſion by virthe of a contract of marriage conceived in favour of the heirs

" of a marriage." The other obtained by the reſpondent, dat
the 10th of January 1720-1, bore " that it did not occur in t
" regiſters of retours in Chancery, that any perſon is ſerved he
" of proviſion to ſums of money or other moveables."

After production of theſe certificates and hearing the import o
the word *heirs* debated, the Court on the 11th of January 1720-1
" found that the three children of the firſt marriage had an
" equal intereſt in the proviſions contained in their mother's con-
" tract of marriage."

Entered, 6 Nov. 1721.

The appeal was brought from " ſeveral interlocutory ſentences
" or decrees of the Lords of Seſſion in Scotland, of the 16th of
" February, and 14th of July 1720, and of the 11th of January
" following."

Heads of the Appellant's Argument.

Though by the conception of the firſt contract, the heirs of the marriage are to ſucceed, which, when the ſubject of the ſucceſſion is perſonal, may admit of the interpretation, that the proviſion was in favour of the children; yet ſtill the father had the power of diviſion, and as he has only given 4000 merks to each of his daughters, which they accepted, this was nothing but a dividing to each of them their ſhare thereof, leaving the reſt for his only ſon to ſucceed to, who, properly ſpeaking, is the only heir of the marriage. Without this the ſaid contract could never be fulfilled, whereby the ſucceſſion to the conqueſt was provided to the heirs of the marriage *in integrum*. And this appears to have been the father's intention; ſince he took no aſſignment of any pretenſions his daughters might have thereto, but gave them ſuch a proviſion as he thought was ſuitable, with reſpect to the heir, and the extent of his fortune.

As to the houſe in Aberdeen, it is out of the queſtion; the appellant's father, during his firſt marriage, having received a diſpoſition from his father to him, in favour of himſelf and his wife, in conjunct fee and life-rent, and to the heirs of that marriage in fee; and the appellant, who alone could be heir of the marriage in lands, is accordingly cognoſced heir and infeft. It appears from the ſecond contract of marriage, that both parties were diffident of the effect of the reſpondent's life-rent in the Houſe; for though the appellant's father warranted it, yet he provided that in caſe of eviction, his heirs ſhould only be liable in 100*l.* Scots *per annum*, for the rent of another houſe; which 100*l.* Scots ought to be taken out of the acquiſition during the ſecond marriage, rather than that the appellant, the heir of proviſion of the firſt marriage, and conſequently a creditor, ſhould be burdened therewith.

As to the father's ſtock, which amounted to 18,000*l.* Scots, at the diſſolution of the firſt marriage, and to 20,000*l.* by the improvement thereof at the time of entering into the ſecond marriage, the proviſion of 15,000 merks to the children of the ſecond marriage, where the remainder included the ſpecial proviſion of 6000 merks in the firſt contract was invalid. But there neither

was

was nor could be a diſpoſition nor aſſignation to any part of the deceaſed's ſtock at the time of entering into the ſecond marriage: all the father could do was to oblige himſelf in the ſum of 15,000 merks certain to the children of the ſecond marriage, which muſt always be ſuppoſed to be made good out of any other ſeparate eſtate, which he had, or might acquire without prejudice to his obligations in his firſt contract of marriage; the children of that marriage being properly creditors to the father. And the father, at his death, left an eſtate behind him ſufficient to ſatisfy both his marriage contracts.

With regard to the interlocutor finding that the three children of the firſt marriage had an equal intereſt in the proviſions contained in their mother's contract of marriage; the import and conſtant acceptation of the word *heirs*, in all deeds and writings, is always underſtood in favour of the eldeſt ſon; the only caſe wherein daughters are joint-heirs with the eldeſt ſon, in the perſonal eſtate, being where they are left unprovided by the father; which is no way applicable to this caſe. The uniform and uſual practice of the records of retours in the Chancery in Scotland, evidently ſhews that the appellant only was capable of being retoured heir of proviſion in the contract of marriage, and he accordingly was ſo retoured. By this interlocutor the two daughters are entitled to an equal ſhare of the whole proviſions in the contract, both real and perſonal, which is directly contrary to the conſtant practice of the Scots law, and the univerſal cuſtom of all degrees of perſons, who always make a difference between the eldeſt, and younger ſons, and daughters, even where proviſions are to *children*; much more when to *heirs*. It is evident that this was the intention of the parties to the contract by their uſing ſimply the word *heirs*, the meaning of which they could not be ignorant of, and by the particular enumeration of the ſubjects provided to the heirs, viz. lands, heritages, fiſhings, &c.

The decree of the Court ſeems inconſiſtent with itſelf, ſince the Court of Seſſion, by the firſt part of their interlocutor of the 16th of February 1720, find that the heirs of the firſt marriage have a right to the acquiſition during that marriage, which the reſpondent has acquieſced in; and yet it is not alleged, that more than 8000 merks has been paid: and the proviſion to the appellant and his ſiſters by the codicil to their father's will comes far ſhort of fulfilling the proviſions in the firſt contract.

Heads of the Reſpondent's Argument.

The appellant has only a right to the third of what his father had at the diſſolution of the firſt marriage, for the proviſion is in favour of *heirs to be lawfully procreate* between the father and mother; which can have no other meaning but the children of the marriage, and not of the heir male only, eſpecially in caſes where there is nothing but perſonal eſtate; and the rather ſince the 6000 merks agreed to be ſettled, is to go in the ſame way as the conqueſt, which plainly ſhews the import and meaning to have

been all the children, otherwiſe the younger children muſt have had nothing.

The father being bound to apply the conqueſt to the children of the firſt marriage, he might diſcharge that obligation the beſt way he could to the ſatisfaction of the parties; and as he was the debtor, whatever advantage is obtained by any tranſaction, muſt be to the uſe of the father; for he muſt be preſumed rather to diſcharge himſelf, than to acquire any right to another. The two ſiſters were then entitled each of them to a third ſhare, the father agrees with them for a leſs ſum, and that muſt and can only be to the benefit of the father, who was their debtor; and this the rather ſince he had been at the expence of their education and marriages after his ſecond marriage, which ſo far diminiſhed the conqueſt of the ſecond marriage, to which the reſpondent and her children had a right. Nor could there be any occaſion for an aſſignment to the daughters ſhares, for the father being debtor, the releaſe extinguiſhed the debt; and the father was ſo far from intending any benefit to the appellant by theſe tranſactions, that he expreſsly declared in his ſettlements, that the ſum of 10,000 merks, and fee of the houſe given to him, ſhould be in full of all he could claim by his mother's contract of marriage, or any other way whatſoever.

With regard to the houſe in Aberdeen, the father was ſeiſed thereof in fee, he could have diſpoſed of it to whom he pleaſed, and conſequently the ſettlement thereof upon the reſpondent for her life only, cannot be called in queſtion by the appellant; and the rather ſince the father has warranted the ſaid houſe to the reſpondent, which warrandice deſcends to the appellant as his heir, and he is thereby bound to perform his father's deeds, and cannot call any of them in queſtion; which caſe was determined by the Houſe of Lords in 1718-19, in the caſe Ayton v. Colville.

No. 50 of this Collection.

The greateſt part of the appellant's father's eſtate was gained during the ſecond marriage: the fortune the reſpondent brought was more than twice as much as that of the appellant's mother; the appellant has had his education at the expence of his father, and has received much more, than any of the children of the ſecond marriage, who muſt be educated, and whoſe proviſions are much diminiſhed by this expenſive ſuit, and the proviſions for the children of the ſecond marriage are entirely rational.

Judgment, 12 Feb. 1721-2.

After hearing counſel, *It is ordered and adjudged that the ſaid petition and appeal be diſmiſſed, and that the interlocutory ſentences or decrees therein complained of be affirmed.*

For Appellant, *Rob. Raymond.* *C. Talbot.*
For Reſpondent, *Sam. Mead.* *Will. Hamilton.*

Hog v. Laſhley on appeal 7 May, 1792.

In the important caſe of Hog v. Laſhley, in the Houſe of Lords 7 May 1792, a judgment of the Court of Seſſion was affirmed, which found that renunciations by children of their claim of legitim operated in favour of a child who did not renounce, and not

not of the father. In the preſent caſe the Houſe affirmed a contrary doctrine laid down with regard to the renunciations made by the children of the firſt marriage of their proviſions by contract.

John Walker of Edinburgh, Merchant, - *Appellant,* Caſe 91.
Robert Forreſter of Edinburgh, Merchant, and William Macpherſon of Edinburgh, Writer, - - - *Reſpondents.*

16th *Feb.* 1721-2.

Bonâ fide conſumption.—An adjudication obtained in 1678, being found extinguiſhed by receipts of the rents: in a ſubſequent action of count and reckoning, the Court having found the defence of *bona fides* ſufficient to liberate till the date of the interlocutor, finding the adjudication compenſed, and that the defenders were not put *in mala fide* by the citations and arreſtments, the judgment is reverſed, and they are ordered to account from the date of the arreſtments uſed at commencement of the former action.

Coſts and Expences.—In an action relative to the commencement of *mala fides*, the Court having found that the ſame did not commence from the date of citation and arreſtment, but from the date of the decree, and refuſed the purſuer his expences; on a reverſal of the judgment, it is ordered that the Court tax, and aſcertain the expences in that action, and that the ſame be then paid to the appellant.

JOHN HANDYSIDE, who was the proprietor of ſeveral houſes in the city of Edinburgh, being indebted to the reſpondents, or thoſe under they claim, they obtained an adjudication of theſe houſes for payment of the ſaid debt, in December 1677; and by virtue thereof got into poſſeſſion of the ſame in 1678. As ſtated by the appellant, the debt due to the reſpondents or thoſe under whom they claim amounted to 277*l.* 15*s.* 6*d.*, and the yearly rents of the premiſes were 66*l.* 13*s.* 4*d.*

In 1713 Janet Handyſide, the daughter of the ſaid John Handyſide, who had been abroad for ſeveral years, and who claimed right to the premiſes as heir to her father who had died many years before, conveyed all her right and title to the premiſes, and all her right of reverſion, to the appellant; who was thereupon infeft.

The appellant ſoon after brought his action before the Court of Seſſion againſt the reſpondents, to have it declared, that the debt due to thoſe under whom they claimed was ſatisfied and paid by their receipt of the rents and profits; and to have the reſpondents decreed to account for what they had received over and above the payment and ſatisfaction of their juſt demands. And in 1714, the appellant likewiſe arreſted the rents in the hands of the tenants; but the reſpondents having found ſecurity to make the ſame forthcoming as accords, the arreſtment was looſed, and the reſpondents were ſuffered to continue in poſſeſſion till the event of the cauſe.

Several preliminary defences were now inſiſted on by the reſpondents, particularly that the legal was expired; but it appearing that there were ſeveral informalities in the adjudication, this defence, among others, was repelled.

The appellant now inſiſted, that the premiſes ſhould be ſequeſtrated; but the reſpondents offering to find ſecurity to make the rents forthcoming, the Court allowed them to continue in the poſſeſſion upon finding ſecurity to be accountable for the rents thereof to thoſe who had beſt right; but in caſe they did not find ſecurity, that then a ſequeſtration ſhould iſſue.

After various other proceedings the Court on the 13th November 1719, reduced the adjudication as null, in ſo far as concerned 4000 merks thereof, and as to 5000 the remainder of the ſums claimed, found the ſame extinguiſhed by intromiſſions; and by ſubſequent interlocutors in January and July 1720, found the reſpondent's right extinguiſhed, and paid by the receipts of themſelves, and thoſe under whom they claimed, and therefore reduced the ſame, and preferred the appellant to the rents in time coming. So far the judgments were not appealed from.

Subject of the preſent appeal.

The appellant having extracted this decree, commenced an action, againſt the reſpondents, to compel them to account for and pay to him the rents they had received pending the ſaid action from 1713 to 1720. The appellants made two defences to this action; the firſt, that the decree extracted by the appellant having ordained the reſpondents' receipts of the rents to be imputed in ſatisfaction of their debts, they could not now be compelled to account in any other method; the appellant however having inſiſted, that the reſpondents were paid their debts before the ſaid action commenced, the objection of the reſpondents was overruled by the court. They afterwards contended, that they poſſeſſed by virtue of a good title, a right that was thought irredeemable, and conſequently that they were *bona fide* poſſeſſors; that a poſſeſſor in that view was not accountable for any rents or profits he might receive out of the premiſes in queſtion, even though another perſon ſhould be afterwards decreed to have a better right; and that he was only to account from the time, ſuch other right was found preferable to his, upon the ground of the maxim, *bona fide poſſeſſor facit fructus perceptos et conſumptos ſuos.* On the 28th of June 1721, the Lord Ordinary "ſuſtained the defence of *bona* "*fide* poſſeſſion to liberate the reſpondents from accounting for "the rents preceeding the interlocutor 13th November 1719, by "which the ſaid adjudication was found null, and repelled the "allegation of the reſpondent's being put in *mala fide* by the "appellants citations and arreſtments." The appellant having reclaimed, the Court, by ſeveral interlocutors of the 14th and 21ſt of July, and 22d of November 1721, adhered to the interlocutor of the Lord Ordinary, and refuſed the appellant his expences in both actions.

Entered, 1 Dec. 1721.

The appeal was brought from an "interlocutor of the Lord "Ordinary of the 28th of June 1721, and from the interlocutors "of

« of the Lords of Seſſion of the 14th and 21ſt of July, and 22d of « November following."

Heads of the Appellant's Argument.

Though the law does indulge a *bona fide* poſſeſſion againſt repetition of the rents, yet to that is required a well-grounded opinion and belief, that what a man poſſeſſes is his own, and no other perſon's. But ſo ſoon as he begins to doubt of his right he falls into a *mala fides*, and ought no longer to retain his poſſeſſion. But the plea of *bona fides* cannot avail the reſpondents in the preſent caſe, ſince they knew they poſſeſſed by a redeemable right, and ſince they alſo knew that they had received five times more than paid their debt, before commencement of the action. When that was once begun, and the rents were attached in the tenant's hands, and the reſpondents had given ſecurity to account for the rents to ſuch perſon as ſhould be found to have right, there cannot be any, the leaſt pretence for a *bona fide* poſſeſſion.

The appellant has prevailed in every ſtep of the proceeding, and had 18 interlocutors in his favour; and ſince the reſpondents have by their affected delays prolonged this action for ſeven years, and continued in poſſeſſion of the premiſes for that time, and pretend not to account for the rents, the appellant humbly hopes alſo to have his expences allowed.

Heads of the Reſpondents' Argument.

The reſpondents had no reaſon to doubt their title to be an abſolute right to the property of the premiſes in queſtion, ſince the adjudications under which they claimed, not being paid off within the time limited by law for that purpoſe, become abſolute rights, and they were only declared redeemable upon ſome informalities, which the reſpondents did not, nor could diſcover, and the appellant is ſo ſenſible, that they were all the time *bona fide* poſſeſſors, that he himſelf demands no account *prior* to the action. A citation or commencing of an action is no argument to take away *bona fide* poſſeſſion, becauſe till judgment be given, the title of the poſſeſſors is good, eſpecially in a caſe where it is doubtful which of the parties had the beſt right, or where the title of the poſſeſſors was evidently a preferable right, and ſo ſuſtained by the Court till the very date of the interlocutor finding their right extinguiſhed by their receipt of the rents. And this has been the uninterrupted practice of the Court, in all caſes, as can be vouched by deciſions.

Though the appellant has prevailed in the action reducing the reſpondents' title as being extinguiſhed by payment, yet he did not prevail in the action relative to the arreſtments. On the contrary he never inſiſted thereon, nor obtained any judgment upon them; and the Court by an interlocutor of 6th July 1715, not appealed from, found the tenants *in tuto* to pay their rents notwithſtanding of the arreſtments, and diſcharged him from laying on any other arreſtments, and that becauſe he had not at that time eſtabliſhed his title, nor for ſome years after. An arreſtment is a very

improper way to make a perſon in *mala fide*, ſince by that very thing he owns the right to the rents to be in another perſon, and found his title to thoſe rents upon the foot of another claim, not as proprietor but as creditor.

The reſpondents apprehend that they can in no view be liable to the appellant for coſts and expences, in regard the apellant's right laboured under ſo many apparent imperfections, that without the aid of the Court the ſame could not be ſupplied; and the rather ſince at the appellant's own deſire a commiſſion was granted for examining witneſſes to ſupply ſuch defects, which occaſioned a great expence to the reſpondents. There is no interlocutor of the Court of Seſſion in the firſt proceſs, which refuſes expences to the appellant appealed from. And in the ſummons, which is the foundation of the ſecond proceſs, the appellant does not ſo much as pray to be allowed expences of the former proceſs. The appellant indeed in the prayer of one of his petitions, craves an allowance for the expences of that proceſs: but the ſame could with no ſhew of reaſon be granted, in regard all the interlocutors of that proceſs are in favour of the reſpondents, nor can any inſtances be given where the Court has given expences in cauſes of a ſimilar nature.

Judgment, 26 Feb. 1721-2.

After hearing counſel, *It is ordered an adjudged, that ſo much of the interlocutor of the ſaid Lord Ordinary of the* 28th *of June* 1721, *and of the interlocutors of the Court of the* 14th *and* 21ſt *of July and* 22d *of November following, whereby the defence of* bona fide *poſſeſſion to liberate the reſpondents from accounting for the rents preceding the interlocutor of the* 13th *of November* 1719, *is ſuſtained, and the allegation of the reſpondents being put in* mala fide *by the appellant's citations or arreſtments is repelled, be reverſed: And it is further ordered that the reſpondents account for, and pay to the appellant the rents and profits of the eſtate in queſtion, intromitted with by them ſince the time of the arreſtments at the inſtance of the appellant in July* 1714, *and that ſuch parts of the ſaid interlocutors whereby the appellant is denied his coſts, ſo far as concerns the coſts of the former ſuit be affirmed, and ſo far as concerns the coſts of this laſt ſuit, be reverſed. And it is hereby further ordered, that the ſaid Lords of Seſſion do forthwith tax, and aſcertain the appellant's coſts of the ſaid laſt ſuit; and that the ſaid laſt coſts when ſo taxed and aſcertained be immediately paid by the reſpondents to the appellant.*

For Appellant, *Sam. Mead. Will. Hamilton.*
For Reſpondents, *C. Talbot.*

Arratt, Eſq, - - *Appellant*; Caſe 92.
Wilſon of Baikie. - *Reſpondent.*

21 *Feb.* 1721-2.

Appeal.—In an action of declarator of truſt an interlocutor is pronounced, holding a defender as conſeſſed upon an account of charge and diſcharge, given in by the purſuer, and he is ordered to denude. Afterwards upon the defender's application, the Court allowed him ten days longer to give in his accounts, but before the expiration of theſe ten days, he brings his appeal againſt certain interlocutors, and amongſt others, againſt the interlocutors holding him as conſeſt; all which are ſpecially affirmed by the Houſe of Peers. After the determination of the firſt appeal, the defender applied to the Court to have liberty to give in his accounts in ten days, as allowed by the interlocutor before the appeal: but it was found that his right was extinguiſhed, and that he muſt denude in terms of the decree affirmed by the Houſe of Lords.

TER the determination of the former appeal, No. 52. of this Collection, the parties returned to the Court of Seſſion, and litigation took place between them relative to the judg- of the Houſe of Lords. In detailing this litigation, it is ne- y to recapitulate ſome of the ſteps taken previous to the r appeal.

e Court, by interlocutor on the 9th of July 1717, "Found t the diſpoſition executed by the reſpondent to the appellant the eſtate of Baikie, was redeemable by payment of the ns reſting due to the appellant after deduction of his intro- ſſions, and ordained him to continue in the poſſeſſion of the l eſtate until it were inſtructed, that he was paid, and remit- to the Lord Ordinary to proceed accordingly." The Lord ary, when the cauſe was called before him, on the 23d ly 1717, "Ordered the appellant to give in an account of rge and diſcharge of his intromiſſions with the ſaid eſtate terms of the act of ſederunt about accounts and reckonings, an account of what was truly paid by him, in acquiring rights upon the ſaid eſtate, as alſo of his neceſſary charges, the vouchers thereof by Tueſday then next." This term fterwards at different times enlarged; and the reſpondent mean time gave in an account of the appellant's intromiſ- and diſburſements, making the balance due to the reſpondent 11*s.* 4*d.* Scots. The appellant having ſtill craved further the Lord Ordinary on the 13th of November 1717, gave till the Tueſday following, "with certification that if he led, he ſhould be found liable to the penalty in the act of lerunt." The cauſe afterwards coming to a hearing, upon 1ſt of November 1717 the Lord Ordinary pronounced the ving interlocutor: "In regard the appellant has failed to e in his accounts, and that the reſpondent has given in an count of charge and diſcharge ſigned by him upon oath in terms of the act of ſederunt, holds the appellant as con- ſed upon the ſaid account given in by the reſpondent, and

" finds that by the ſaid account the appellant was paid off all his " rights on the ſaid eſtate; and therefore decerns the appellant " to denude himſelf thereof in favour of the reſpondent, and de- " clares in terms of the reſpondent's libel, and alſo decerns the " appellant to pay to the reſpondent 81*l.* 11*s.* 4*d.* Scots, being " the balance of the ſaid account."

The appellant having reclaimed, their lordſhips " *allowed him* " *ten days longer to give in his accounts.*" Inſtead of giving in his accounts, however, he brought his appeal to the Houſe of Lords, againſt ſundry interlocutors, and particularly againſt the ſaid interlocutor of the 21ſt of November 1717, whereby he was held as confeſſed upon the account given in by the reſpondent. And all the interlocutors appealed from (as ſtated in the former appeal) were, on the 23d of March 1718-19, affirmed, with 40*l.* coſts to the reſpondent.

The reſpondent afterwards made application to the Court of Seſſion to put the ſaid judgment in force againſt the appellant, by compelling him to denude himſelf of the ſaid eſtate in favour of the reſpondent, purſuant to the ſaid interlocutor of the 21ſt of November 1717, and for payment of the 81*l.* 11*s.* 4*d.* Scots, the balance of the account whereon he was held confeſſed; and the appellant contending that he was ſtill at liberty to give in an account of charge and diſcharge, the Court on the 9th of July 1719 " Found the appellant's right to be extinguiſhed, and that he muſt " denude in the terms of the decree affirmed by the Houſe of " Lords, reſerving action to the ſaid appellant for any articles " that were not brought into the ſaid account." And to this interlocutor the Court adhered on the 11th of July and 16th of September following.

Entered, 10 Jan. 1720-1.

The appeal was brought from " an interlocutor of the Lords of " Seſſion of the 9th of July 1719, and the affirmances thereof the " 11th of the ſame month and 16th of September following."

Heads of the Appellant's Argument.

Though the interlocutor of the 21ſt of November 1717, came in the recital of the proceedings to be mentioned in the ſaid petition and appeal, yet the ſame was not inſiſted on in the caſe, nor pleaded at the bar; as the appellant well knew that interlocutors of that kind, which are pronounced by default, are eaſily altered and relieved againſt by the Judges themſelves. In the preſent caſe, that interlocutor had been ſet aſide by the Court, and ten days longer time allowed to the appellant to give in his vouchers, within which ten days the order on the appeal having been ſerved upon the reſpondent, the Court could have no further proceedings till the appeal were diſcuſſed. After that the appellant expected that he had the ſame liberty to apply to the Court, and give in his vouchers, as he had at the time when the order was ſerved: and he conceived, that it never was the intention of the Houſe of Lords to oblige him to re-convey the eſtate without being paid the money he had really laid out, eſpecially ſince ſome of the interlocutors mentioned in the former appeal, and equally affirmed with

that of the 21ſt of November 1717, have decreed that he ld be paid his juſt debts.

Heads of the Reſpondent's Argument.

he appellant has kept the reſpondent out of the poſſeſſion of ſtate for above ten years, and put him to a tedious and expen- law-ſuit, to the almoſt utter ruin of the reſpondent and his ly. The appellant has ſtill more than two years rent of the e remaining in his hands unaccounted for; and if there were articles not brought into the account, he has his remedy nſt the reſpondeht, by virtue of the reſervation in the inter- tors now appealed from.

fter hearing counſel, *It is ordered and adjudged, that the peti- and appeal be diſmiſſed, and that the interlocutor of the Lords of n and the affirmances thereof be affirmed.* Judgment, 21 Feb. 1721-22.

or Appellant, *Sam. Mead. Will. Hamilton.*
or Reſpondent, *Rob. Raymond.*

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the appeal caſes in this cauſe, the whole proceedings ſtated he former cauſe, No. 52, of this collection, are recapitu- l.

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rlotte Marchioneſs Dowager of Annandale, *Appellant*; Caſe 93.
es Marquis of Annandale. - *Reſpondent.*

15th *Dec.* 1722.

Proviſions to heirs and children —Huſband and wife.—In a contract of marriage with a firſt wife, a perſon obliges himſelf to ſettle his eſtate on the heirs of the marriage; by a procuratory of reſignation, executed in ſame terms, he reſerved power to grant proviſions to a ſecond wife and younger children, on which infeftment followed; and by another deed he afterwards reſtricted his right of granting proviſions to a ſecond wife, and children, to the extent of 100,000*l.* Scots: After a ſecond marriage, he grants a bond to a ſecond wife for an annuity or jointure of 1000*l.* ſterling: but made no proviſions for children of the ſecond marriage. This ſecond wife in a queſtion with the heir of the firſt marriage, is declared to have the right to her jointure, till ſhe drew thereout the ſum of 100,000*l.* Scots.

Regiſtration.—A deed reſtricting an unlimited power of granting proviſions to a ſecond wife and younger children, which unlimited power was contained in infeftments upon record, is found valid, though not regiſtered, in a queſtion between the heir and a ſecond wife.

the marriage-contract in 1686, between William Marquis of Annandale, and Sophia Fairholme his firſt wife, in conſi- tion of the marriage, and of 80,000 merks Scots paid down he lady's portion, the Marquis obliged himſelf to ſettle all the s he was then ſeiſed or poſſeſſed of, in favour of himſelf, and eirs male of the marriage, and that the ſaid heirs male ſhould ed to him in his honours and dignities, and in all and what- ſoever

ſoever lands and others then any way appertaining to him. Th jointure thereby ſettled upon the ſaid Sophia was 8000 merk Scots per annum. In terms of the ſaid marriage-contract th Marquis on the 25th of February 1690, executed a procurator for reſigning all his lands, therein particularly mentioned, to hav new infeſtments thereof granted to himſelf in life-rent, and to th reſpondent his eldeſt ſon, then an infant of tender years, in fe under ſeveral proviſoes and conditions; particularly, that the ſam ſhould be ſubject to the jointure ſettled upon the then Mar chioneſs, or any additional life-rent proviſion he ſhould give he or any other wife he ſhould happen to marry; and that the ſam ſhould alſo be ſubject to all the juſt debts then owing by him, an to ſuch proviſions as he was then obliged, or ſhould be thereafte obliged to pay to his younger children, of that or any other ſubſe quent marriage; and he reſerved to himſelf a power of chargin the premiſes with debts to the amount of 40,000 merks Scot Upon this procuratory a crown-charter was obtained, and infeſ ment taken thereon.

On the 15th of March 1715, the Marquis executed a dee reciting the ſettlement of 1690, and the clauſe therein containe reſerving power to make proviſions for the wives and children c future marriages, which proceeds thus: "And now ſeeing w "are reſolved further to explain the clauſe of proviſion abo "narrated, and to ſignify our pleaſure thereanent; and to dete "mine how far we think fit to extend the aforeſaid reſerved fa "culty of providing the haill other children of this preſent mar "riage, or for the proviſion of haill other children and wives c "ſubſequent marriages: Therefore," &c. "Wit ye us to b "bound, like as we by theſe preſents bind us, not to exerciſe th "foreſaid faculty to a further extent than 100,000*l.* Scots, t "haill other children procreate, or to be procreate of my bod "in this preſent marriage, or for the haill proviſions in favour c "the haill children or wives of ſubſequent marriages; to whic "ſum of 100,000*l.* money foreſaid, the indefinite faculty abo "narrated, of providing the haill other children aforeſaid is ex "preſsly hereby reſtricted." The deed of reſtriction was no regiſtered, but was kept by the Marquis in his own cuſtody.

Marchioneſs Sophia died in December 1716, and in 1718 th ſaid late Marquis intermarried with the appellant, the daughter o Mr. Vanden Bemple, his ſecond wife. No contract or ſettlemen was made upon this ſecond marriage, but the late Marquis on th 20th of February 1719 granted an heritable bond of proviſion t the appellant for a life-rent of 1000*l.* ſterling *per annum*, iſſuing out of his eſtates, during her life; upon this ſhe was infeft o the 6th of March following, and her ſeiſin duly regiſtered.

The late Marquis dying upon the 14th of January 1721, an the reſpondent his eldeſt ſon and heir refuſing to pay the ſaid life rent of 1000*l.* ſterling *per annum* to the appellant, ſhe brought proceſs before the Court of Seſſion for poinding the ground. Th reſpondent and his tenants appeared, and made defences; and th Court on the 15th of February 1722, "Found, that the late Mar "qui

" quis of Annandale by his contract of marriage did oblige him-
" ſelf, that the heir male of the marriage ſhould ſucceed to him
" in his honours and eſtate, and that the faculty reſerved to the
" late Marquis in the procuratory of reſignation 1690, and in the
" charter and ſeiſin following thereupon, whereby he reſerved
" power to burthen his heir with any life-rent proviſion to a lady
" whom he might afterwards happen to marry, did not import an
" unlimited power to burthen the heir with an unlimited life-rent
" at his pleaſure; but that the ſame was qualified by his contract
" of marriage; and that by the ſaid contract and reſerved faculty
" he had only power to burthen the reſpondent, the heir of pro-
" viſion, with competent life-rent proviſions in favour of the ap-
" pellant his ſecond lady, ſuitable to the circumſtances of his
" family and eſtate at the time, and remit it to the Lord Ordinary
" to proceed accordingly."

The appellant reclaimed againſt this interlocutor, praying that at leaſt her life-rent proviſion ſhould ſubſiſt till ſhe drew out of it the ſum of 100,000*l.* Scots: but after anſwers for the reſpondent, the Court on the 27th of February 1722, " Adhered to their " former interlocutor, and found, that by the deed of reſtriction " made by the late Marquis in 1715, the faculty reſerved by him " in the writ of tailzie made by him in the year 1690, was in all " events reſtricted to 100,000*l.* Scots for proviſions to a ſecond " lady and younger children, and that the appellant's intereſt " herein cannot exceed the annual rent of the ſaid ſum of " 100,000*l.* Scots."

The appellant brought this interlocutor under review, and ſtated that as the reſtriction was not to be diſcovered upon the record, it could have no effect againſt her: the reſpondent made anſwers, and the Court on the 26th of June 1722 " Adhered to their former in-
" terlocutor, and found that the aforeſaid reſtriction, though not re-
" giſtered, is effectual both againſt the Marchioneſs and her child-
" ren."

The appeal was brought from " ſeveral interlocutors and decrees " of the Lords of Seſſion of the 15th and 27th of February, and " 26th of June 1722." Entered 12 Oct. 1722.

Heads of the Appellant's Argument.

The late Marquis was no further bound by the contract of marriage of 1686, than that the eſtate ſhould deſcend to the reſpondent as his heir, and that he ſhould not inſtitute another heir, or diſpoſe of that eſtate to a third party, without an onerous conſideration. But the late Marquis ſtill had an abſolute power of charging the eſtate with debts at pleaſure, and might have ſold the whole or any part of it for a valuable conſideration; and the reſpondent, the heir of that contract, would have been obliged to fulfil and make good, not only all deeds done for valuable conſiderations, but alſo all rational deeds done by the Marquis touching that eſtate. The jointure given to the appellant was no fraudulent deed, nor done with intention to diſappoint the reſpondent's ſucceſſion, but was rational and ſuitable to the Marquis's quality; and marriage has always been looked upon in law as a valuable

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conſideration for a jointure. If any difficulty ariſes fron contract, it is fully removed by conſideration of the procur 1690, which was a new ſettlement, which gave ſeveral advar to the reſpondent, by reſtricting the Marquis's abſolute pov charging the eſtate with debt at pleaſure to a very limited 40,000 merks Scots, and by veſting the property of the eſt the reſpondent, and reſtricting the late Marquis's right to rent, which prevented him from ſelling. On the other hanc only advantage allowed to the Marquis was the allowin eſtates to be charged with a jointure to a ſecond wife; a though this ſettlement was made in the reſpondent's minori neither does nor can pretend to ſet it aſide, it being the title which he enjoys the eſtate, and a deed which he has acknow by writings under his hand.

The deed of reſtriction 1715, can never be underſtood to to the Marquis's power of providing a life-rent or jointur wife; it appears that he only meant to reſtrict the faculty o viding for children; and though the word *wives* is thro in a very ſtrange manner, it muſt have been done either *pe riam* of the writer, or from a belief that the late Marquis power to give a proviſion in money to a wife, over and abo jointure; and, therefore, the Marquis is reſtricted that h not charge the eſtate with a ſum of money to a wife and cl above 100,000*l.* Scots. Beſides, this life-rent is but a ſ proviſion, nowiſe exorbitant for the Marquis's widow, wl alſo two ſons by him unprovided for.

The deed of reſtriction can have no effect againſt the lant, as it was not recorded in the regiſter of reverſions, bu up as a latent deed to enſnare creditors or a ſecond wife; notice was given to the appellant before her marriage before her infeftment was taken and recorded upon h rent. The argument here is the ſtronger, becauſe the Ma power being conſtituted by inſeftment, it could not be away, but by a renunciation duly regiſtered.

Under the late Marquis's contract of marriage with h wife, the appellant would have been entitled to her terce, ſettlement had been made upon her, which would not have much ſhort of the life-rent: and even by the deed of reſt the late Marquis had power to charge the eſtate with 10 Scots for proviſions for his ſecond lady and iſſue; and the quis having made no other charge than the life-rent, the ap muſt in the worſt event be thereby entitled to the ſaid 10 Scots, or the life-rent, till that ſum with intereſt be exh which may equal if not exceed the life-rent.

In the progreſs of this action, the appellant prayed t ſome aliment pending the action, which the Court refuſe ſo that ſhe has had no maintenance for herſelf and two c out of the late Marquis's eſtate, ſince his death.

Heads of the Reſpondent's Argument.

The reſpondent as heir of proviſion by his mother's contract of arriage in 1686, is ſo far from being liable to perform all his ther's deeds, that he as creditor to his father under that con-act has an undoubted right in law to reduce all voluntary deeds, pecially unreaſonable proviſions for a ſecond wife and her chil-en, in prejudice of his ſucceſſion, which was ſettled in conſide-tion of his mother's fortune.

In the contract of marriage 1686, there is no power expreſsly ſerved to the late Marquis to make any proviſion for the wife children of a ſubſequent marriage, nor was it neceſſary, becauſe e fee being then in himſelf, under an obligation to reſign in vour of the heirs male of that marriage, he had by law a wer to make a reaſonable proviſion for the wife and children of ſecond marriage, with due regard to the eſtate and circum-nces of the family, and the portion which ſuch ſecond wife ight bring. But he had not power to make a ſettlement to hat extent he pleaſed; for every ſuch ſettlement is by the un-ubted principles of the Scots law reduceable by the judges to equitable proportion, wherein the greateſt regard is always had the intereſt of the heir of the firſt marriage, and the fortune of s mother. But in the ſettlement of 1690, when the late Mar-is diveſted himſelf of the fee, and reſigned the ſame to the ſpondent, it was neceſſary to reſerve an expreſs power of making oviſion for the wife and children of a ſubſequent marriage, for herwiſe he would have been abſolutely barred for ever. But e could not by his own deed create a new power, or reſerve to imſelf more than he was entitled to by law at the time of ſuch ſignation; and therefore the reſerved power in the deed being ndefinite, muſt be conſtrued to be only ſuch a power as he had y law before.

The reſpondent's acceptance of the ſettlement 1690, appears nly by a deed of the 25th March 1715, which was not execu-d till after his father had by his deed of the 15th of ſame onth, expreſsly reſtricted his power to the ſum of 100,000*l.* Scots.

The power reſerved by the ſettlement 1690, being only per-nal, needed not to have been regiſtered, but happened to be ſo accident, being recited in the inſtruments conſequent upon e procuratory of reſignation, which were neceſſary to be regiſ-ted: and as the reſervation of the power itſelf, and the exerciſe it by any perſonal deed, would have been effectual without re-iſtration; ſo the reſtriction of it by the deed 1715, was valid hough not regiſtered; and though ſuch powers, or the exerciſe or eſtriction of them be not regiſtered, it can be of no ill conſequence purchaſers for a valuable conſideration, ſince they muſt know at ſuch deeds need not be regiſtered. It is well known in the cots Law, that ſeveral rights on record can be avoided by perſonal onds or receipts, though not upon record, ſuch as adjudications id heritable bonds upon which infeftment has followed. There

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is an expreſs law for recording ſaſines, &c., which particularly recites all deeds thereby appointed to be recorded, and appoints a record for that purpoſe; but there is no order of law for recording diſcharges or reſtrictions of perſonal faculties and powers.

But whatever claim a creditor for a valuable conſideration might pretend, in the preſent caſe there can be no ſuch queſtion; here there was no ſettlement before marriage, the appellant took her hazard of the legal proviſions; nor was there any portion paid to entitle her to be a purchaſer for a valuable conſideration, and ſhe can claim no more than what the Marquis could voluntarily give: he could certainly never extend that proviſion beyond the powers he had by law, and the limits he had given to himſelf in the explanatory or reſtricting deed.

It is plain from the words of this deed, 1715, that the Marquis meant to extend the reſtriction to proviſions to wives, as well as to children. In ſeveral places of it the Marquis mentions his deſign to reſtrict his power of providing for younger children, and wives of ſubſequent marriages to 100,000*l.* Scots.

By the uniform practice and conſtruction of the law of Scotland, where any ſum of money is ſet aſide, or appointed for wife and children, the wife's intereſt in that ſum is different from the childrens': the intereſt of the children extends to the fee; and the intereſt of the wife to the life-rent only; ſo that the proviſion in the deed of reſtriction 1715, has the ſame effect in law, as if the power reſerved to the late Marquis had been in expreſs words to provide the life-rent or intereſt of 100,000*l.* Scots to the wife, and the fee of that ſum to the children. If a perſon in the diſpoſition of his eſtate to his eldeſt ſon, reſerve a faculty in caſe of a future marriage, to ſettle one of the baronies diſponed for the proviſion of a wife and children of a ſubſequent marriage, no one will imagine, that this reſervation would enable him to diſpoſe of the fee of ſuch barony to the wife, or to give her any other intereſt in it than a life-rent; and the power reſerved to the late Marquis by the deed 1690, to make proviſion for a ſubſequent wife, was only by a life-rent, though not reſtrained to a certain ſum; and the deed 1715, only reſtrains ſuch powers reſerved by the deed 1690, to a certain ſum, but does not change or alter the nature of them.

Judgment, 15 Dec. 1722.

After hearing counſel, *It is ordered and adjudged that the ſaid interlocutor of the* 15th *of February, complained of in the ſaid appeal, and ſo much of the ſaid two other interlocutors as affirm the firſt interlocutor be reverſed: And it is further ordered and adjudged, that ſo much of the interlacutor of the* 26th *of June, whereby the Lords of Seſſion, found that by the ſaid deed of reſtriction made by the ſaid Marquis of Annandale, the* 15th *of March* 1715, *though not regiſtered is effectual againſt the appellant and her children be affirmed: And it is further ordered and adjudged, that ſo much of the interlocutor of the* 27th *of February, whereby the Lords of Seſſion found,* "*that by the* "*ſaid deed of reſtriction made by the ſaid Marquis in* 1715, *the fe-*"*culty reſerved by him in the writ of tailzie, made by him in the year* "1690, *was in all events reſtricted to* 100,000*l. Scots, for proviſions*

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to a second lady and younger children, and that the appellant's interest therein, cannot exceed the annual rent of 100,000*l. Scots" be reversed: And it is hereby further ordered and adjudged, that the appellant's life rent of* 1000*l.* per annum, *is a charge on the estate, until he has drawn thereout* 100,000*l. Scots with interest thereof, from the decease of the said late Marquis, and no longer, and that the said* 1000*l. per annum, be accordingly paid to the appellant, at the respective terms appointed for payment thereof, in the bond of provision, with interest to be computed for such part thereof, as is now in arrear from the times the same ought to have been paid, until the same shall be paid: And it is further ordered that the Lords of Session do direct proper diligences, both personal and real for the appellant's recovery of the arrears of the said annuity, and all future payments thereof yearly, and termly as the same shall fall due, together with the interest for the before-mentioned arrears, from the times at which the same became due, until the same shall satisfied.*

For Appellant, *Rob. Raymond. Ro. Dundas.*
For Respondent, *Dun. Forbes. C. Talbot. Will. Hamilton.*

Case 94.

Charlotta Marchioness Dowager of Annandale, and the Lords George, and John Johnston, her Children, Infants, by their Mother and Guardian, - *Appellants;*
James Marquis of Annandale. *Respondent.*

21st *Dec.* 1722.

Provisions to heirs and children.—Presumption of revocation.—A father executes a deed in favour of his heir giving him a locality over part of his estate, and assigning the tacks to him, with warrandice from fact and deed, and a power of revocation by *writ under the grantor's hand:* The first year the father marked the rents of the allocated lands, in his rentals, as to be paid to the son; the next year this was not done, and the factor received a letter to pay no more of the son's bills. The allocation was not thereby revoked.—But a deed of revocation found in the grantor's repositories after his death, though not published or recorded, revoked the allocation.

WILLIAM Marquis of Annandale, in 1686, married Sophia, the daughter and only child of John Fairholme, Esq. who was possessed of a large estate, which afterwards came to the said marquis. By the contract of marriage, the said marquis in consideration thereof, and of 80,000 merks Scots, paid down for the lady's portion, bound himself to resign his estates for new infeftments thereof, in favour of himself and the heirs male of that marriage; and accordingly he afterwards executed a deed of entail on the 25th of February 1690, resigning and settling all his lands and estates therein particularly mentioned to himself in fee-rent, and to the respondent his eldest son of the said marriage

in fee, reſerving to himſelf a power *inter alia* to charge the eſtate with debts to the amount of 40,000 merks Scots, with what portions he thought fit to younger children, and with power alſo of giving what jointure he pleaſed to a ſecond lady.

On the 7th of March 1715, the late marquis by his deed reciting the ſaid ſettlements and that in conſideration of the dutiful reſpect teſtified by the reſpondent, and for his convenient ſupport, he did out of his good pleaſure renounce and aſſign in his favour a part of the ſaid eſtate, of above 500*l.* ſterling per annum, value, aſſigned the tacks thereof to the reſpondent, and empowered him to receive the profits thereof at Whitſunday then next, for the half year preceding, and yearly thereafter with an expreſs clauſe in theſe words: "and we do hereby declare that "theſe preſents are to continue till we *recal the ſame by writ un-* "*der our hand.*" The warrandice run in theſe words, "this re- "nunciation and aſſignation we oblige ourſelves to warrant from "our own act and deed, done or to be done in prejudice thereof, "except the before-mentioned tacks."

In conſequence of this deed or allocation, that part of the eſtate appropriated to the reſpondent, was not inſerted in the rental ſigned by the marquis, and delivered to his factor, (as uſual,) as a rule for levying the rents, for the year 1715; and the reſpondent accordingly had the profits for a year and a half ending at Whitſunday 1716. From thence however till Martinmas 1720, ſoon after which the late marquis died in January 1721, the rents and profits of the allocated lands were received on his own account. And in the rental delivered to Henderſon the factor after Martinmas 1716, ſigned by the late marquis, the allocated lands were again inſerted, the profits to be received for the uſe of the marquis.

The marquis afterwards wrote a letter to Henderſon the factor, which the appellants ſtate to have been written from London, the 14th of February 1717, and received by Henderſon ſome time in the ſame month or in March thereafter, but which the reſpondent ſtates to have been without date; this letter taking notice that *his ſon* had drawn bills on Henderſon for 250l., diſcharged Henderſon from accepting or paying them. And after the death of the marquis, there was found in his cabinet a deed, bearing date the 12th of May 1718, reciting the ſaid deed of allocation, and that the marquis had formerly by letters to his factors and chamberlains recalled and ſtopt the precepts which he had given for payment of the ſaid allocation, and he not only ratified what he had ſo done, but did thereby revoke the ſaid ſettlement, and any other ſettlement or allocation granted to the reſpondent and declared the ſame void and null. With regard to this revocation, it was ſworn by Henderſon the factor, that the laſt time, the late marquis was in Scotland, he told Henderſon, that he had made a written revocation of the allocation, and that a paper which he held in his hand was the revocation, though it was not then read to, or by Henderſon.

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The late marquis by his laſt will and teſtament left his perſonal eſtate ſubject to the payment of his debts contracted ſince the ſettlement of his real eſtate in 1690, for which the reſpondent was not bound, to the Marchioneſs Dowager, his ſecond lady, whom he named executrix, in truſt for his children of that marriage, (which Marchioneſs Dowager and her children are the appellants in this cauſe.) This was all the proviſion which theſe two ſons had from their father, and which, after deducting the debts affecting the ſame, amounted to a very moderate ſum. This will was proved in Doctors Commons, after a caveat and conteſt on the part of the reſpondent, and he in the mean time confirmed himſelf executor to his father in Scotland, and took poſſeſſion of the perſonal eſtate in that country.

The appellants having brought an action againſt him to denude him of the executry, he commenced a proceſs before the Commiſſary Court of Edinburgh, concluding that he ſhould be found a creditor upon the perſonal eſtate for the yearly value of the lands which had been allocated to him, for the year 1716, and thereafter till the day of his father's death. The commiſſaries on the 4th of December 1721, "found that the allocation was not recalled by any writ under the marquis's hand, and decreed *cognitionis cauſa*, conform to the libel." And on the 23d of January thereafter the commiſſaries "repelled the defence founded on the revocation 12th May 1718, in reſpect of the latency of that deed, during the late marquis's lifetime, whereby the reſpondent could not apply for a legal modification in place of the allocation."

The appellants brought a bill of advocation before the Court of Seſſion, and their Lordſhips on the 17th of July 1722, "found that the allocation by the late marquis in favour of the reſpondent was revocable only by a deed under the deceaſed marquis's hand; and that neither the putting the allocate lands in the rentals given to Mr. Henderſon, and his accounting to the late marquis for the ſame, nor the letter to the ſaid Henderſon, were ſufficient to infer a revocation, and that the deed of revocation lying in the late marquis's cabinet, at his deceaſe, without publication or intimation, cannot take effect from the date thereof; and that the late marquis's ſaying to Henderſon he had made a revocation, which he ſaid he then held in his hand, but did not read to Henderſon, nor allow him to read, (as mentioned in Henderſon's oath,) was not ſufficient to interrupt the reſpondent's right to the rents of his locality."

The appeal was brought from "a decree of the Lords of Seſſion of the 17th of July 1722." Entered, 12 Oct. 1722.

Heads of the Appellants' Argument.

The allocation was, by the expreſs words of it, revocable at pleaſure; and whatever motives it was founded on, it was granted and accepted on that condition on which alone it could ſubſiſt. Nor in fact was there any onerous conſideration for it; the late Marquis having made other diſtinct conceſſions to the reſpondent,

when he enlarged his father's faculty of charging the eſtate with debts. The only conſideration was that of reſpect and duty then paid by the reſpondent to his father, as the deed itſelf mentions: and the reſpondent's withdrawing that duty and reſpect, and going beyond ſea without his father's knowledge, were the motives of recalling the allowance, as is ſet forth in the deed of revocation.

The power of revocation plainly extended to the aliment itſelf, and not to a power only of altering the lands out of which it was to be levied, as was contended by the reſpondent: and the warrandice cannot alter the caſe, but muſt follow the nature of the deed. Nor could there be any reaſon for a *declarator* in this caſe, which would have been neceſſary only if the reſpondent had fallen from the aliment by any penal irritancy.

The rentals for the year 1716, and ſubſequent years, all ſigned by the late marquis, whereby the rents of the allocate lands are directed to be received and applied to the marquis's uſe, and the late marquis's letter to Henderſon forbidding him to pay the reſpondent's bills, are a ſufficient revocation of the allocation. In the worſt view, it was revoked by the deed of May 1718; and there was no occaſion for publiſhing ſuch revocation, or giving notice of it to the reſpondent. But the reſpondent had ſufficient notice thereof, by having the payment of his bills ſtopt, after which he never drew ſixpence out of the eſtate, nor ever attempted it: which alſo ſhews the reſpondent's opinion of and acquieſcence in the revocation.

The late marquis conſidered the allocation as fully revoked, as is evident in this, that his perſonal eſtate is the only ſubject he appropriates for the proviſion of his younger children, which he muſt have known to be ineffectual, if the arrears of this aliment, or any part thereof, were a burden on this ſubject; and he would doubtleſs in that caſe have exerciſed the power he had by the ſettlement of providing for the younger children out of his real eſtate.

Heads of the Reſpondent's Argument.

By the deed of 1715, the power of revocation is confined to be *by writ*, that is a deed, under the grantor's hand; and could not be revoked by implication. Though the late marquis's receiving the rents to his own uſe ſhould amount to an implied revocation, it will be of no force in this caſe, as not anſwering the proviſo in the deed.

Nor will the letter written to the factor, forbidding him to anſwer his ſon's bills out of his effects, amount to a revocation: for as this letter is without date, ſo it does not mention the reſpondent's name; and the late marquis had at that time another ſon of age, and the prohibition is only not to pay the bills out of *his effects*, that is, the grantor's, but did not relate to the rents belonging to the reſpondent. Beſides, the factor being examined upon oath, ſwears, *that he never had any miſſive letters or written orders*, recalling the ſaid allocation, or ſtopping payment thereof to the reſpondent;

reſpondent; nor did he know or ſuſpect where any ſuch might be.

The deed of revocation, now ſet up, was never publiſhed or heard of, nor any notice given thereof to the reſpondent, till after he had commenced his action; and it is acknowledged to have been found in the late marquis's ſtrong box or ſcrutoir after his death, and therefore was an incomplete deed of no force, never delivered or executed ſo as to take effect.

The warrandice in the ſaid deed of 1715 againſt the acts or deeds of the late marquis, ſhews plainly that the intention of the ſaid power of revocation was only as to an allocation or commutation of the lands out of which the aliment iſſued, but not to revoke the aliment itſelf; for in that caſe the warrandice would take place, which is the laſt covenant in the deed, and conſequently will controul whatever goes before it, and either does or ſeems to contradict it. And beſides this, by the law of Scotland every proprietor of an eſtate, much more a nobleman, is obliged to aliment his eldeſt ſon, ſuitably to his eſtate and quality.

After hearing counſel, *It is ordered and adjudged, that ſo much of the ſaid interlocutor complained of in the ſaid appeal, whereby the Lords of Seſſion found "the allocation by the late Marquis of Annandale in favour of the reſpondent was revocable only by a deed under "the deceaſed marquis's hand; and that neither the putting the "allocate lands in the rentals given to Mr. Henderſon, and his accounting to the late marquis or his commiſſioners for the ſame; nor "the letter to the ſaid Henderſon were ſufficient to infer a revocation," be affirmed: And it is further ordered and adjudged, that the reſt of the ſaid interlocutor be reverſed; and it is hereby further declared and adjudged, that the ſaid deed of revocation bearing date the 12th day of May 1718 do take place from the date.* Judgment, 21 Dec. 1722.

For Appellants, *Rob. Raymond. Ro. Dundas.*
For Reſpondent, *Dun. Forbes. Will. Hamilton.*

Case 95. Mr. Patrick Haldane, Advocate, on his own behalf, and Robert Dundas, Esq; his Majesty's Advocate for Scotland, on behalf of the Crown, - - - *Appellants*;

The Dean and Faculty of Advocates, and the principal Clerks of Session, - - *Respondents.*

4th Feb. 1722-3.

Appeal.—The Court of Session having refused to put Mr. Haldane, (who had obtained the king's letter of appointment, as an Ordinary Lord of Session,) upon trial for what the Court deemed want of due service, as an advocate, an appeal lay from the determination of the Court.

College of Justice.—Mr. Haldane, who had been a member of the faculty of advocates for seven years, but who by being a member of parliament, and a commissioner for the forfeited estates, during great part of that time, did not then attend in the College of Justice, was nevertheless qualified to be a Lord of Session.

BY the acts of parliament 1579, c. 93. and 1592, c. 134. it was enacted, That when the place of any Ordinary Lord of Session became vacant, the Crown was to present and nominate a man that feared God, of good literature, practice, judgment, and understanding of the laws, of good fame, having sufficient living of his own, and who could make good expedition and dispatch of matters touching the lieges of the realm, who should be first sufficiently tried and examined by the Lords of Session: and in case the person presented should not be found so qualified by them, it should be lawful to the said Lords to refuse the person presented to them; and the king's majesty was to present another so oft as he pleased, till the person presented were found qualified for using the said place.

By the 19th article of the Union, it is declared, "That hereafter none shall be named by her majesty, or her royal successors, to be Ordinary Lords of Session, but such *who have served in the college of justice as advocates, or principal clerks of session for the space of five years*; or as writers to the signet for the space of ten years: with this provision, that no writer to the signet be capable to be admitted, unless he undergo a private and public trial, on the civil law, before the faculty of advocates; and be found by them qualified for the said office two years before he be named to be a lord of the session; yet so as the qualifications made or to be made, for capacitating persons to be named ordinary lords of session, may be altered by the parliament of Great Britain."

The appellant Mr. Haldane was admitted an advocate on the 18th of January 1715; and on the demise of Lord Fountainhall, he obtained his majesty's letter, bearing date the 12th of December 1721, nominating and presenting him to be an Ordinary Lord of Session, and requiring the court effectually to try, and thereafter

after to admit and receive him to the ſaid ordinary place, accepting him as one of their number. This letter was preſented to the Lords of Seſſion, ſitting in judgment on the 26th of the ſaid month, and Mr. Haldane required to be admitted to trial in the ordinary form: but the court deferred proceeding thereon till the next day.

Upon the 27th of December, the dean and faculty of advocates put in their petition, ſetting forth that Mr. Haldane, immediately after his admiſſion as an advocate, left the Court of Seſſion, and went into the country to make intereſt for his election as a member of parliament: that for the three ſubſequent ſeſſions he attended parliament conſtantly till the latter end of the year 1716, when he was appointed one of the commiſſioners of the forfeited eſtates: that from that time forward Mr. Haldane regularly attended the parliament whilſt it ſat, and during the intervals of parliament attended his office as commiſſioner of inquiry; and that office being kept at Edinburgh, he ſometimes came into the Court of Seſſion among his brethren the advocates; and on certain occaſions not exceeding three or four times in the whole, appeared at the bar: and the petitioners thence ſuggeſted, that Mr. Haldane had not ſerved as an advocate in the terms of the 19th article of the Union; and concluded, that he ought not to be found qualified to be an Ordinary Lord of Seſſion. A petition to the ſame purpoſe was preſented by the principal clerks of Seſſion.

The Court thereupon ordered Mr. Haldane to give in a ſpecial condeſcendance of his ſervice as an advocate in the College of Juſtice, ſince his admiſſion in January 1715. This he accordingly did, and inſiſted, that he had been near ſeven years an advocate in the College of Juſtice, and had practiſed as ſuch; except when his attendance in parliament called for his attendance there; and and he ſtated more particularly that he had attended locally at the bar, part of ten different Seſſions, when he had practiſed. At that time the Seſſion took up ſix months of the year, viz. the months of November, December, January, and February, as the winter Seſſion, and the months of June and July, as the ſummer Seſſion.

In anſwer to Mr. Haldane's condeſcendance, the dean and faculty of advocates preſented a memorial, wherein they obſerved: 1ſt, That whereas there were 30 Seſſion months in five years, it appeared by Mr. Haldane's own admiſſion, that he had ſerved no more than the half of that time. 2dly, That though he ſtated as *time of ſervice*, the whole Seſſion time that he remained in Scotland, yet in reality except 3 or 4 appearances, he did not ſerve at all during that ſpace, having been employed in his office of Commiſſioner of Enquiry, the office hours of which were the ſame with the ſederunt hours, of the Lords of Seſſion; and he very rarely gave himſelf the trouble to put on his gown. And 3dly, That as his accidental attendance on ſome few occaſions did not come up to the *terms* of the 19th article of Union, ſo neither did it at all anſwer the *intention* thereof; becauſe a lawyer whoſe attendance was interrupted, was not in the way of thereby gaining employment or experience in buſineſs.

On the 28th of December 1721, the Court pronounced the following interlocutor, "The Lords having conſidered the 19th "article of the treaty of Union, his royal majeſty's letter re- "quiring the Lords effectually to try, and afterwards receive "Mr. Patrick Haldane to the place of an Ordinary Lord of Sef- "ſion, with the condeſcendances given in to them for the ſaid "Mr. Patrick Haldane, and the ſeveral repreſentations and peti- "tions by the dean and faculty of advocates, and by the ſix prin- "cipal clerks of Seſſion; they find the facts contained in the two "condeſcendances given in by the ſaid Mr. Patrick Haldane, "are not ſufficient to make it appear that he is qualified to be an "Ordinary Lord of Seſſion, according to the 19th article of the "Union."

On the 23d of January 1722, a repreſentation was exhibited to the Court of Seſſion by the appellant Robert Dundas, his majeſty's advocate for Scotland, (ſaid to be done by the king's ſpecial command,) inſiſting that they had no power to refuſe his majeſty's nomination, founded on the 19th article of the Union, and at ſame time a petition was preſented for Mr. Haldane praying to be admitted to trial in common form. The Court of Seſſion, in an addreſs to the king, laid before his majeſty the reaſons why they apprehended that they had juriſdiction, and on the 26th of January 1722, "ſuperceded to adviſe Mr. Haldane's petition until the "competency of the Court of Seſſion to judge of the qualifica- "tion required by the 19th article of the Union be determined."

This objection to the competency of the Court having been waived by a letter directed to the Court of Seſſion, from one of his majeſty's principal ſecretaries of ſtate; and anſwers having been put in to the petition of Mr. Haldane by the dean and faculty of advocates, the Court on the 8th of June 1722, "ad- "hered to the interlocutor dated 28th December laſt 1721, and "therefore find they cannot admit the petitioner to trial on his "other qualifications required by law."

Entered, 23 Oct. 1722.

The appeal was brought from "ſeveral interlocutory ſentences "of the Lords of Seſſion of the 28th of December 1721, the "26th of January following, and 8th of June 1722."

The reſpondent gave in anſwers, wherein they admit the ſeveral interlocutors appealed from to have been pronounced, but ſay, "That as theſe ſentences are not acts of judgment or decrees, in "queſtions of private right betwixt parties pleading in a civil court, "but acts regarding the public policy of the nation, in execu- "tion of a truſt repoſed by divers ſtatutes in the Court of Seſſion "for maintaining the regulations made for the better conſtitution "of that court; they ſubmit it to the judgment of this moſt "honourable houſe, whether the appellants have properly "brought their appeal, and whether in a caſe of this nature, "where the reſpondent had no patrimonial or pecuniary intereſt "their appearing to inform the Court of Seſſion of facts mate- "rial towards the determination of the queſtion before them, did "properly entitle the appellants to make them parties to the ap- "peal."

The

The ſeveral proceedings out of the Journals in 1702, in the cauſe between Thomas Lord Wharton, and Robert Squire; and the order upon receiving the appeal of James Greenſhields, clerk, the 25th of March 1710 (*a*), being read; it was reſolved that counſel on both ſides ſhould be heard upon this point only, whether the matter complained of by the appellants be proper to be determined by the houſe of Lords upon appeal. Journal, 6 Dec. 1722.

On this Preliminary Point (*b*).—*Argument of the Appellants.*

The appellants humbly apprehend their appeal is regularly and properly brought; for Mr. Haldane received from the crown a grant of the office of one of the judges of the Court of Seſſion, and inſiſted in the regular way before that court to have his right aſcertained, and he admitted to his office; and the reſpondents appeared in Court, and objected to his right, on pretence that the grant in his favour was hurtful to a right and privilege eſtabliſhed in them by the 19th article of the Union, and prayed judgment upon their right, and againſt the right of Mr. Haldane. And accordingly the Court of Seſſion, after conſidering the petition of the reſpondents, the anſwer for Mr. Haldane, and reply for the reſpondents, given in, in form of memorials, pronounced the interlocutor firſt recited to the hurt of the appellants' right.

His majeſty's advocate, and Mr. Haldane having ſeverally applied for a review of that judgment, the reſpondents continued to appear as parties, and put in their formal anſwers, in the ſame manner as is practiſed in every other cauſe; in which they inſiſted to have the judgment affirmed, which the court did accordingly.

From the face of the proceedings it appears, that this was a regular cauſe, wherein there were parties litigating upon their different rights and titles, and praying judgment upon them; and that very formal, though erroneous, judgments were given upon the claims, anſwers and replies of the ſeveral parties, which have been entered on record in the ſame way with other judgments: In conſequence of which that decree, extracted in due form, was allowed by the court to be taken out, and now lies before the Houſe of Lords.

The judgments complained of are given by the Court of Seſſion, upon a point of right depending on an explication of an article of the Union, the juriſdiction of which Court of Seſſion, in all caſes, is now ſubordinate to the Houſe of Lords, and conſequently their decrees liable to be reviewed upon appeal.

By the expreſs words of the claim of right as aſcertained by the convention of eſtates, at the Revolution, it is declared to be the right and privilege of the ſubjects, to proteſt for remeed of law (which is the ſame with appealing) againſt ſentences pronounced by the Lords of Seſſion without diſtinction: and the decrees complained of are ſentences of that Court, as the anſwer of the reſpondents ſets forth.

(*a*) No. 6 of this Collection.
(*b*) On this point, there is a ſeparate caſe for the appellants.

If the Lords of Seſſion under a ſpecious pretence of an incapacity of the perſon appointed by the crown to be a judge of that court, may refuſe ſuch perſon; and if ſuch refuſal ſhould be final and concluſive, the undoubted right of the crown to appoint ſuch officer will be diveſted out of the crown, and veſted abſolutely in the Lords of Seſſion: and the perſon who may obtain ſuch nomination from the crown, though every way qualified to execute that office, if, through a miſtaken judgment of the Lords of Seſſion, he ſhould be repreſented otherwiſe, will be deprived of a right, which by law he is juſtly entitled to, without any manner of relief (*a*).

Journal, 19 Dec. 1722. After hearing counſel, for two ſucceſſive days, (on the 17th and 18th of December) the ſeveral proceedings out of the journal upon the petition and appeal of James Greenſhields, clerk, being read: and after long debate, a motion was made, and the queſtion was put, "That it is the opinion of this Houſe that the "matter complained of in the petition of Mr. Patrick Haldane "and Robert Dundas, Eſq; is proper to be determined by this "Houſe upon an appeal;" it was reſolved in the affirmative.

On the Merits—Heads of the Appellants' Argument.

Mr. Haldane was admitted to ſerve as an advocate near ſeven years before he was named to be an Ordinary Lord of Seſſion. The 19th article of the Union requires no local attendance at any bar, far leſs at the bar of the Court of Seſſion, (which is but one court of ſeveral that belong to the college of juſtice), but requires only ſerving as an advocate in that body of lawyers called the college of juſtice for the ſpace of five years, &c. This means that the perſon named to be an Ordinary Lord of Seſſion, ſhall for the ſpace of five years before ſuch nomination have borne the character of an advocate, without having followed any other employment inconſiſtent with that character, and diſcharged the functions of an advocate from time to time as occaſions might offer. All this Mr. Haldane has done; for he was not only admitted advocate near ſeven years before he was named to be an Ordinary Lord of Seſſion, but had practiſed as occaſion offered, actually in the ſeveral courts, except when he was called to attend his duty in parliament: and it is hoped that ſerving in parliament is not inconſiſtent with ſerving as an advocate; and conſequently that there is no reaſon for deducting the time of his ſerving in parliament from the account of the time he has ſerved as an advocate.

According to the reſpondents' explication of the article of the Union, if an advocate had practiſed with the greateſt aſſiduity for never ſo many years either before the Court of Exchequer, or the Court of Juſticiary in Scotland, or part of the time at the bar of the Houſe of Lords; and had even practiſed in the College of Juſtice, by chamber practice, in adviſing and ſettling pleadings, &c. which were to come and did come before the Court of Seſſion, but had not thought fit to attend at the particular bar of

(*a*) No caſe or argument appears for the reſpondents upon this point.

that

that court; ſuch perſon could not be named an Ordinary Lord of Seſſion, which appears to be very unreaſonable. And though it be admitted, that the reaſon of requiring this qualification of ſerving five years as an advocate before a perſon could be named an Ordinary Lord of Seſſion, was that he might acquire due knowledge in the law and forms of proceedings; yet by ſtudy and giving advice, and by having an account of the proceedings in the court ſuch knowledge might well be obtained; and therefore there is no reaſon to ſupport the reſpondents' interpretation of the article of the Union; for the law may well preſume that a perſon who has been an advocate ſo many years, and of no inconſiſtent employment, muſt have acquired, by ſuch conduct as is before mentioned, a ſufficient knowledge in the law and forms, which may be well acquired without a local attendance at the bar of the Court of Seſſion: and a calculation of months, weeks, or days of local attendance, at diſtant and remote times, (ſuch as the reſpondents ſeem to aim at), for making up five years, is neither founded in the 19th article of the Union, nor is ſuch attendance, in the nature of the thing, capable of a legal proof.

The reſpondents objected, that Mr. Haldane, before he had been five years an advocate, was appointed a commiſſioner and truſtee of the forfeited eſtates, which was inconſiſtent with his ſerving as an advocate, ſince it neceſſarily called him to attend in that court, during the hours of the ſitting of the Court of Seſſion. But no law does require a conſtant attendance for the ſpace of five years in the court-houſe where the Seſſion ſits, and no advocate does attend in that manner. By the ſame way of reaſoning, an advocate who is commiſſary of Edinburgh, or a ſheriff depute, might be objected to as being incapable of being named to be an Ordinary Lord of Seſſion, becauſe the commiſſary and ſheriff courts meet frequently at the ſame time with the Court of Seſſion. And in fact the being one of the commiſſioners of the forfeited eſtates did not hinder Mr. Haldane's attendance as occaſion required before the Court of Seſſion, but obliged him ſeveral times to attend, when otherwiſe it would not have been neceſſary, and to have the particular concern in the management and direction of a great number of cauſes before the ſeveral courts.

Heads of the Reſpondents' Argument.

The Lords of Seſſion being by the laws of the realm, and the ancient eſtabliſhed conſtitution of that court, to try the qualifications of the perſons preſented to a ſeat in it, with power to *admit* or *refuſe*, and their authority and privileges being ratified and confirmed by the very article which induces the qualification in queſtion, the enacting that qualification, *ex neceſſitate juris*, ſubjects it to the cognizance of thoſe judges, who muſt determine whether a perſon be qualified before they can admit him.

Though the words *attendance at the bar* be not found in the article, yet words of the ſame force and effect are uſed. It is impoſſible to SERVE *in a court* without attending it; and, therefore, where the law requires in expreſs words *ſervice* in the college of juſtice,

juſtice, it neceſſarily implies attendance. It is true, a perſon may be ſaid to be an advocate in the college of juſtice, that is to be a member of ſuch faculty, though he actually reſide at Weſtminſter or at Rome; but then while he reſides at Weſtminſter or at Rome he cannot be ſaid to *ſerve in the college of juſtice.*

When the words of a ſtatute have a clear, determinate, and unambiguous meaning, the legiſlature may alter them; but judges are not at liberty to explain them in contradiction to their known ſignification upon any arguments drawn from the preſumed reaſon and intention of the law; and therefore, the article having required ſervice for five years as an advocate in the college of juſtice, the judges neither could nor ought to have expounded it otherwiſe, than that attendance for five years in the court, where he was to ſerve as an advocate, was neceſſary. But if the meaning of the word *ſervice* were in itſelf doubtful, the obvious intention of the article, and the known conſtitution of the college of juſtice, would be ſufficient to determine it to that ſenſe, in which the judges have underſtood it.

Advocates are not admitted in Scotland as gentlemen are called to the bar in England, after a certain ſuppoſed attendance on the courts, whereby they are preſumed to have arrived at a reaſonable knowledge of the laws and forms of proceeding proper to their country. But in place of the municipal law of Scotland, gentlemen intending to enter advocates, apply themſelves to the ſtudy of the civil law generally in foreign univerſities; upon that law only they are tried, without the leaſt examination into a ſuppoſed knowledge of the laws of their own country, and if they are found poſſeſſed of a reaſonable degree of knowledge of that law, they are admitted advocates. Thus it happens, that an advocate at his admiſſion is not preſumed to know the leaſt title of the municipal law of Scotland, or of the forms of proceeding ſo neceſſary towards the right diſtribution of juſtice; nor has he any other method to arrive at knowledge in theſe matters, but in a cloſe attendance on the courts, where experience and obſervation may perfect his ſkill.

Taking this to be the caſe, and ſuppoſing that by the article of the Union the nation intended to ſecure to itſelf judges of knowledge and experience, what muſt be the meaning of the word *ſervice?* An advocate of five years ſtanding without attendance, knows probably leſs of the civil law, without knowing more of the municipal law and form than when he was admitted: an advocate of five years ſtanding, attending on the courts during that ſpace, is in a way of attaining a thorough knowledge of the *law* and *forms* of his country.

As the law thus expreſsly requires five years ſervice, it is a queſtion how far the judges could take upon them to overlook even occaſional abſence of days or weeks; but ſurely where the abſence is *habitual*, and the ſervice only *occaſional*, inſomuch that the appellant does not think fit to affirm that he ſerved more than 15 ſeſſion months in almoſt ſeven years, no one can imagine that the intention of the law, which requires full five years ſervice, is anſwered

anſwered by accidental attendance for the half of that time; or that the power of expounding laws entruſted with the judges is ſo arbitrary, that they can conſtrue the *half* to be equal to the *whole*.

The reſpondents never imagined, that the office of member of parliament was inconſiſtent with that of an advocate: but then they take it to be certain that attendance in the parliament at Weſtminſter is inconſiſtent with *ſervice* in the college of juſtice at Edinburgh, *during the ſpace of ſuch attendance*. The appellant agrees that he attended locally at Weſtminſter ever ſince his admiſſion, except about 15 ſeſſion months: his attendance there, then, made it *impoſſible* for him to be where he ought to have *ſerved* to qualify himſelf for the character of a judge, in the terms of law; and, conſequently, though the offices are, abſtractly ſpeaking, conſiſtent, yet ſince the *attendance* in the one has made the *ſervice* in the other impracticable, it has the ſame effect in the preſent queſtion, as if the offices were truly inconſiſtent. The ſame thing holds good as to the other office of commiſſioner of inquiry; becauſe, as has been before taken notice of, the office hours of that commiſſion were the ſame with the hours of buſineſs in the Court of Seſſion.

The reſpondents agree, that *abſentia reipublicæ cauſa*, ſaves to a man all privileges, whereof he ſtood poſſeſſed, when firſt he undertook public ſervice: and conſequently, that if the appellant had been qualified by *ſervice* as an advocate to be a judge, before he attended the parliament, he could not have loſt that qualification by his abſence. But they can by no means agree, that a man by entering into the ſervice of the public, can acquire a qualification which the law has ſaid, can no other way be come at, than by ſervice in a particular ſtation. The legiſlature thought five years ſervice as an advocate abſolutely neceſſary to furniſh a perſon with that knowledge and experience, that is requiſite for a judge: now unleſs five years ſervice as a member of the Houſe of Commons ſhall be thought as proper a mean of arriving at knowledge and experience of the laws and forms of proceeding in Scotland, as five years ſervice in the Court of Seſſion, the appellant's attendance in parliament brings him as little within the meaning, as it does within the words of the article of Union.

After hearing counſel, *It is ordered and adjudged, that the interlocutory ſentences of the 28th of December 1721, the 26th of January following, and 8th of June 1722, complained of in the ſaid appeal, be reverſed: and it is further ordered and adjudged, that the appellant Patrick Haldane be forthwith put upon trial according to law.* Judgment, 4 Feb. 1722-3.

For Appellants, *Rob. Raymond. Ro. Dundas.*
For Reſpondents, *Dun. Forbes. Sam. Mead.*

Annexed to the caſe for the reſpondents is given the following abſtract, ſaid to be taken from Mr. Haldane's condeſcendances of

of the times at which he affirmed that he ſerved in the court, from the time of his admiſſion till the date of his majeſty's letter, nominating him to be a judge.

Seſſions ſince his admiſſion, during which he might and ought to have ſerved.				During theſe he affirms he ſerved in the court of Seſſion.			And thereby admits he did not ſerve in the court of Seſſion, but attended the parliament.		
	Months.	Weeks.	Days.	Months.	Weeks.	Days.	Months.	Weeks.	Days.
In the Winter Seſſion 1714-15, from 18 January to laſt February -	1	1	2	1	—	—	—	1	2
Summer Seſſion 1715 - -	2	—	—	—	—	—	2	—	—
Winter Seſſion following - -	4	—	—	—	—	—	4	—	—
Summer Seſſion 1716 - -	2	—	—	—	—	—	2	—	—
Winter Seſſion following - -	4	—	—	3	2	—	—	2	—
Summer Seſſion 1717 - -	2	—	—	—	—	—	2	—	—
Winter Seſſion following - -	4	—	—	1	3	—	2	1	—
Summer Seſſion 1718 - -	2	—	—	2	—	—	—	—	—
Winter Seſſion following - -	4	—	—	1	—	—	3	—	—
Summer Seſſion 1719 - -	2	—	—	2	—	—	—	—	—
Winter Seſſion following - -	4	—	—	1	—	—	3	—	—
Summer Seſſion 1720 - -	2	—	—	1	—	—	1	—	—
Winter Seſſion following - -	4	—	—	1	—	—	3	—	—
Summer Seſſion 1721 - -	2	—	—	—	—	—	2	—	—
Winter Seſſion following, from 1 Nov. to 12 December - - -	1	1	4	1	—	—	—	1	4
Seſſion time in all - -	40	2	6	15	1	—	25	1	6

The reſpondents ſtate, that every article of Mr. Haldane's non-ſervice in this abſtract is vouched by his own words, excepting the firſt of one week, and two days, which is ſtated by conjecture upon his own acknowledgment, that during the firſt Seſſion he was abſent for ſome few days about his election to parliament. And all the articles ſtated to his account as ſervice, depend ſingly upon the credit of his own aſſertion, the reſpondents having all along denied that he ſerved with them as an advocate, except upon ſome few occaſions.

On the 21ſt of January 1724, the preſent appellants preſented a petition to the Houſe of Lords, complaining of the further proceedings of the Court of Seſſion, after the judgment given on the appeal; but the Journals do not ſtate the particular grievance. This petition was referred to a committee to conſider and report, no report appears upon the Journals, but an act was paſſed in the ſame

ſame Seſſion of parliament, "for explaining the law concerning "the trial and admiſſion of the Ordinary Lords of Seſſion." This act of parliament gives his majeſty the right of judging in future, with regard to the matters ſimiliar to that which was at iſſue by the preſent appeal. 10 G. 1. c. 19.

Kenneth Mackenzie, brother of George Mackenzie of Balmuckie, Roderick Mackenzie younger of Reidcaſtle, Lewis Mackenzie his brother, Donald Mackenzie of Kilcowie, John Chiſholm of Knockfin, and Archibald Chiſholm his brother, *Appellants;*

Mr. Daniel Mackilligin, and Mr. John Mackilligin, Miniſters of the Goſpel at Allneſs, - - - - - - - *Reſpondents.*

Caſe 96.

6th Feb. 1722-3.

Spuilzie.—Art and Part.—Certain perſons who were preſent with the rebels, (under the command of Lord Seaforth,) when a ſpuilzie was committed, are found liable in damages, conjunctly and ſeverally, for the damages committed by the ſaid party.

The amount of the damages aſcertained by the oaths of the purſuers.

Intereſt allowed from the day, after the party of rebels had left the premiſes ſpuilzied.

Coſts and Expences.—The appellants having failed to appear, on the day appointed for hearing, the reſpondents' are heard, and the judgment affirmed with 100*l.* coſts.

IN May 1718 (*a*), the reſpondent Daniel, in his own right, and by virtue of a factory from the preſbytery of Dingwall, and the other reſpondent John, brought an action of ſpuilzie againſt the appellants, before the Court of Seſſion, for ſatisfaction of certain damages occaſioned by the appellants; and the reſpondent ſtated, that upon Monday the 10th of October 1715, the appellants with a party of armed highlandmen, under the command of the late Earl of Seaforth, came to the village of Allneſs where the reſpondents reſided, and continued there till Saturday the 15th, during which time, they took poſſeſſion of the houſes of the reſpondents, carried off a great part of the houſhold furniture, and cut and deſtroyed the reſt, carried off, or tore, and deſtroyed all the reſpondent Daniel's books, and likewiſe a library of books belonging to the preſbytery of Dingwall, and likewiſe two parochial libraries, of all which the reſpondent Daniel was the keeper, deſtroyed all their corn, and cut and deſtroyed the planting, and every thing of value that could be found belonging

(*a*) This is entirely taken from the caſe for the reſpondents; none appears for the appellants, and as they deſerted the appeal, it is probable that none was preſented for them.

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to either of the respondents, who upon the approach of the said rebels were obliged to fly for their own safety, and live private for some time; and could not return to their houses for above five months.

The appellants made defences, in general, denying the libel; and a defence of *alibi* was also set up by the appellants Roderick and Donald Mackenzie. In June 1720, of consent, a commission was granted for examining witnesses by the respondents to prove their libel, and for the appellants to prove their defences; and accordingly several witnesses were examined for the respondents, but none were examined by the appellants; and the term was circumduced against them.

The cause coming to be heard, the appellants did not appear, but the Court having heard and considered the depositions in the cause, on the 8th of July 1721, "found it proved, that at the "time libelled a party of the rebels, which were then under the "command of the late Earl of Seaforth, came to the town of "Allness, within which the respondents' houses are situated; "and that the said party continued there several days, and that "by the said party, the respondent Mr. Daniel's house was "plundered, his doors, trunks, and chests broken open, and his "books and the plenishing and furniture of the house carried off "and destroyed; and that his growing corns, his corns in his "barn, and barn-yard, and his peats and herbage of his yard "were also consumed or destroyed by the said party: And also "found it proved, that at the said time, and by the same party "the respondent Mr. John Mackilligin's house was rifled, his "plenishing carried off, his corns, peats, and planting destroyed "and his bee-hives and the locks and doors of his house carried "off; and found it proved, that the appellants were all of the "said party; and found the defence of alibi not proved; and "also found that the aforesaid qualifications proved are relevant "to infer that the appellants were art and part in the commission "of the above spuilzies; and that they are therefore liable con- "junctly and severally *in solidum* for the damages which were "thereby done to the said Mr. John and Daniel Mackilligins, re- "spondents; and remitted it to the then next week's ordinaries "or to either of them, to take the said Mr. Daniel's oath *in* "*litem* on the particulars and the extent and value of his "damages, and on the violent profits."

The respondent Daniel having been examined swore to the extent of his damages, and exhibited an inventory thereof; and on the 28th of July 1721, the Court "Having "considered the inventories referred to by the respondent "Daniel in his oath, and having advised the said oath, found the "appellants liable conjunctly and severally to the said Mr. Daniel "Mackilligin for the values of the books in the two inventories "produced, and also for the sums in the inventory of the goods "spuilzied from the said Mr. Daniel, extending in all to the sum "of 2482*l.* 12*s.* Scots, and for the interest of the said sum from "the 16th day of October 1715 years, and in time coming during

" the not payment, deducing as is deduced in the above calcul " the value of the books which the ſaid Mr. Daniel expects to " get back; and alſo found the defenders liable to Mr. Daniel for " the expence of this proceſs, and for his perſonal expence in " attending, in ſo far as the ſame ſhould be found neceſſary or " reaſonable; and remitted to the Lord Ordinary in the cauſe to " liquidate the expence of the proceſs according to the regula- " tions, and to modify the perſonal expences." And the Lord Ordinary accordingly decerned for Daniel's expences amounting to 645*l.* 9*s.* 4*d.* Scots. The appellants having reclaimed, the Court, on the 29th of July 1721, adhered to theſe interlocutors.

The reſpondent John being examined upon a commiſſion, alſo ſwore to the particulars which he had loſt, and the values thereof; and the Court pronounced another interlocutor (*a*) of the ſame nature in John's cauſe, and decerned the appellants to make him ſatisfaction for the ſum of 1279*l.* 7*s.* Scots, with intereſt; and his expences were decerned for, amounting to 134*l.* 16*s.* Scots.

Both theſe decrees having been extracted, the appellants brought an action of reduction; but after a hearing of the cauſe on the 24th of July 1722, the Court " repelled the reaſons of reduc- tion;" and to this interlocutor they adhered on the 31ſt of July 1722.

The appeal was brought from " ſeveral interlocutory ſentences " or decrees of the Lords of Seſſion of the 28th of July 1721, " 23d February 1721-2, and the affirmances thereof the 24th and " 31ſt of July 1722." Entered, 23 Oct. 1722.

Heads of the Appellants' Argument.

Whatever damage the reſpondents may have ſuſtained, there as no proof that the ſame was occaſioned by means of the ap- ellants, or that any of them took any of the reſpondents' goods, r gave any orders for ſo doing; it were therefore unreaſonable load them with making reparation for what damage the reſpon- ents ſuſtained.

There is no proof of the value of the reſpondents' damages, t their reſpective oaths *in litem*; which was an indulgence they d not ſo much as pray to be allowed by their libel, and conſe- uently muſt avoid the decree as being *ultra petita*, eſpecially nce the action was not commenced ſoon after the damage one.

The decree gives the reſpondents intereſt for their ſeveral de- ands from the 16th of October 1715, though in the libel the harge is, that the facts were committed on one or other of the ays of September, October, November, December, January, or ebruary of the ſaid year.

The appellants are decreed jointly and ſeverally, to pay the eſpondents their damages, though it was not prayed by ibel.

(*a*) The date is not mentioned; but it appears to have been the interlocutor 2 February 1721-2, which was appealed from.

The reſpondent Daniel had allowance for the expences of both actions, and his perſonal expence in attending the ſame; and yet, by the decree in favour of the reſpondent John, he is likewiſe allowed his expences; ſo that the appellants were ſubjected to a double payment of expences.

Heads of the Reſpondents' Argument.

It appears by the proofs in the cauſe, that all the appellants were preſent in the village of Allneſs with the armed Highlanders; that ſeveral of them were in the reſpondents' houſes at that time; and that during the time the appellants and the rebels were there, the houſes of the reſpondents were plundered by the ſaid rebels, and every thing therein carried off and deſtroyed. Theſe facts being eſtabliſhed, the decree againſt the appellants muſt be juſt; for where a number of men commit violence, it may be very difficult (nor indeed is it neceſſary) to prove the particular perſons who deſtroyed or took away the goods: It is ſufficient to prove that the injury or damage was done by ſuch a party, and that the appellants were of that party, which is ſufficiently proved by a multitude of witneſſes.

An oath *in litem* is, by the law of Scotland, as much the determined method of proof where a ſpuilzie is libelled, as writ or witneſſes are in any other caſe; and indeed in moſt caſes of that nature, any other proof is impoſſible: And no man in his libel is obliged to ſet forth the method of his proof, and conſequently this decree has proceeded regularly and according to the uſual forms in ſuch caſes. The action was commenced in May 1718, which will avoid any objection from delay.

The libelling of a ſpuilzie in its own nature implies violent profits, damages, and expences; that is, where the nature of the thing ſpuilzied admits of violent profits, they are decreed; otherwiſe the Judges decree intereſt: and the decree has been very indulgent to the appellants in giving intereſt, for certainly the reſpondents muſt have ſuſtained much greater damage; and their demand thereof was actually libelled. It appears by the proofs that the rebels came to the village of Allneſs on Monday the 10th, and continued till Saturday the 15th of October, during which time the damage was done; and it was therefore regular to decree intereſt from the 16th of October, ſince before that time the damage was done.

A ſpuilzie being libelled againſt ſeveral perſons, it imports their being liable jointly and ſeverally; for ſince they were all acceſſary to the wrong, the judgment was rightly pronounced, and the ſame is particularly ſo libelled.

The reſpondent John has no allowance for expences, but ſuch as were not allowed to the reſpondent Daniel; and therefore the appellants are not liable to a double payment; and the reſpondents conceive that the Court has made them but the juſt and uſual allowances in caſes of ſpuilzie, which indeed are leſs than the half of the expences which the reſpondents were out of pocket.

Whereas

Whereas this day was appointed for hearing counſel upon this appeal d anſwers: Counſel appearing for the reſpondents, but no counſel the appellants, and the reſpondents' counſel being heard and with-awn, It is ordered and adjudged, that the petition and appeal diſmiſſed; and that the interlocutory ſentences or decrees therein nplained of be affirmed: And it is further ordered, that the appel-its do pay, or cauſe to be paid to the reſpondents, the ſum of 100l. *their coſts in reſpect of the ſaid appeal.* Judgment, 6 Feb. 1722-3.

For Reſpondents, *Ro. Dundas.* *Will. Hamilton.*

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mes Macpherſon, of Killyhuntly, - *Appellant;* Caſe 97.
hn Macpherſon, of Dalrady, - *Reſpondent.*

11th *Feb.* 1722-3.

Truſt—Qualifications of truſt found to be irrelevant.

THIS appeal related to certain deeds executed in favour of the reſpondent, by Elias Macpherſon, of Invereſbie, being conyances of his whole eſtate, bearing to be for onerous conſiderams, and containing abſolute warrandice. Theſe deeds were ecuted in 1693, 1694, 1695, and 1696.

The appellant's father had a wadſet upon the eſtate of this lias; and Elias, on the 7th of February 1696, conveyed his ght of reverſion of this wadſet to a truſtee for the appellant's ther, by a deed bearing to be for onerous conſiderations. Elias ſo executed an inſtrument on the ſame 7th of February 1696, *claring upon his ſoul and conſcience*, that the deeds formerly ecuted by him, in favour of the reſpondent, were in truſt aly.

After this period, on the 24th of February 1696, Elias exeited another deed in favour of the reſpondent, reciting certain nds formerly granted by him in the reſpondent's favour for oney lent, and that the ſame bonds being returned, he acknowdged the ſame as the price of his eſtate remaining unencumbered ith wadſets. Elias died without iſſue, and the reſpondent having ken ſteps for the redemption of the wadſet now belonging to e appellant, the appellant brought an action of declarator before e Court of Seſſion, to have it declared, that all the deeds rmerly executed by Elias Macpherſon, in the reſpondent's faour, were only in truſt for the grantor. In this action he inſted that the cauſe of action having ariſen before the act 1696 1696, c. 25. c. 25. was paſſed, the truſt might be proved by other means than rit, or oath of party, he founded upon the declaration of *ſoul nd conſcience*, and other ſpecial circumſtances in the ſituation of e parties.

The reſpondent made defences, and after ſundry proceedings the Court on the 13th of July 1721, "found that the qu lifica- "tions of truſt alledged by the appellant, are not relevant and "therefore aſſoilzied the reſpondent and decerned."

The appellant gave in ſeveral petitions againſt this interlocutor, but the Court on the 28th and 29th of July 1721, and 9th of February 1722, "adhered to their former interlocutor."

Entered, 23 Oct. 1722. The appeal was brought, "ſeveral interlocutory ſentences or "decrees of the Lords of Seſſion of the 13th, 28th, and 29th days "of July 1721, and 9th of February 1722."

(The particular circumſtances of the caſe are ſtated at conſiderable length in the appeal caſes, but not with ſufficient diſtinctneſs, to render an abridgement of them uſeful.)

Judgment, 21 Feb. 1723. After hearing counſel, *It is ordered and adjudged that the ſaid petition and appeal be diſmiſſed, and that the interlocutory ſentences or decrees therein complained of be affirmed.*

For Appellant, *Ro. Dundas.* *C. Talbot.*
For Reſpondent, *Dun. Forbes.* *Will. Hamilton.*

Caſe 98. Alexander Murray, of Broughton, Eſq; *Appellant;* George Bullerwell, Gentleman, - *Reſpondent.*

Ex parte (*a*)

12th *Feb.* 1722-3.

Price.—In a competition between two perſons, claiming to be heirs to an eſtate, the inqueſt refuſed to retour either of them. One of the parties in an action of reduction and declarator, calls the other as a defender: a third claimant now craves to be admitted, as a defender in this action, ſtating himſelf to be in the ſame degree of propinquity with the other defender, which the purſuer acknowledged. The Court having refuſed to admit this third party as a defender in that action, the judgment is reverſed, *ex parte.*

JAMES Earl of Annandale died about 80 years ago, leaving no heirs of his own body, and in default of them, his eſtate went to the daughters of Sir James Murray of Cockpool, paternal uncle to the ſaid earl. The appellant, and the Viſcounteſs of Stormont, were deſcended from theſe daughters.

The reſpondent laid claim to the eſtate of the ſaid James Earl of Annandale, in the character of his neareſt heir; and took out a brieve from Chancery for ſerving himſelf neareſt heir; and gave in his claim to the inqueſt accordingly. The Viſcounteſs of Stormont, appeared as a party by her counſel, and objected to the evidence brought by the reſpondent, as no wife ſufficient to prove that he was heir, or at all related by deſcent of lawful iſſue

(*a*) [illegible] only, no appearance having been

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to the ſaid earl; and at the ſame time ſhe having alſo taken out a brieve from chancery, put in her own claim, and inſiſted that ſhe ſhould be retoured as neareſt heir to the ſaid earl. The jury, however not being ſatisfied with the evidence adduced by either of them, gave verdicts againſt them both, and refuſed to retour either of them as neareſt heir to the Earl of Annan late.

The reſpondent thereupon brought his action before the Court of Seſſion, for ſetting aſide the verdict of the jury as erroneous, and to have it found, that he was neareſt heir to the earl. To this action, the reſpondent called the Viſcounteſs of Stormont as a party; but took no notice of the appellant, who (as he ſtates) is the undoubted heir portioner of the ſaid Sir James Murray of Cookpool, father's brother of the ſaid earl, with the ſaid Viſcounteſs of Stormont, and ſo equally entitled with her in the ſaid earl's ſucceſſion.

The appellant, however, appeared for his intereſt by his counſel, in ſupport of the verdict complained of by the reſpondent, and prayed to be heard againſt the reſpondents' claim. And the Court on the 28th of February 1722, "found that the appellant ought to be admitted for his intereſt."

The reſpondent reclaimed, ſetting forth that he had not made the appellant a party; but that the action he was carrying on was of no prejudice to the appellant, the ſcope of it being only to ſet aſide an erroneous verdict, given by the jury to the prejudice of the reſpondent: and that it would be ſtill entire, and more proper for the appellant to appear before another jury, which would be called after the erroneous verdict was ſet aſide, and there to object againſt the reſpondent's claim.

After anſwers for the appellant, the Court on the 21ſt of June 1722, "altered their former interlocutor, and found that the appellant could not be admitted in that action." And to this interlocutor the Court adhered on the 30th of the ſame month of June and 1ſt of December thereafter.

The appeal was brought from "ſeveral interlocutory ſentences or decrees of the Lords of Seſſion of the 21ſt and 30th days of June, and an interlocutor of the 1ſt of December 1722." Entered, 10 Dec. 1722.

Heads of the Appellant's Argument.

Though the reſpondent has not made the appellant a party to the action, that was the reſpondent's fault and error; but this cannot hinder the appellant from appearing as a party for his own intereſt, and to defend in an action, the ſcope of which was to defeat his titles to the eſtate, and ſucceſſion of the Earl of Annandale. Beſides, by the nature of the brieve, all perſons having intereſt are called, by what is named in the law of Scotland an edictal citation.

The reſpondent admitted, that the appellant had the ſame intereſt and concern with the Viſcounteſs of Stormont, and conſequently ſince ſhe is a proper party to the action, the appellant muſt be ſo too. The appellant likewiſe admitted, that the appellant was a proper party to object to his claim before the jury, and to

have inſiſted for ſuch a verdict as the jury gave, conſequently he muſt be a proper party to appear in ſupport of that verdict, and to juſtify it now that it is given.

Journal, 12 Feb. 1722-3. *Whereas this day was appointed for hearing counſel upon this petition and appeal; counſel appearing for the appellant, but no counſel for the reſpondent; and the appellant's counſel being heard and withdrawn, It is ordered and adjudged, that the interlocutory ſentences of the 21ſt and 30th days of June, and the interlocutor of the 1ſt of December laſt, complained of in the ſaid appeal be reverſed; and that the interlocutor of the 28th of February, laſt whereby it is decreed, "that the appellant ought to be admitted for his intereſt" be affirmed.*

For Appellant, *Ro. Dundas. Dun. Forbes.*

Caſe 99. Thomas Rigge, of Mortoun, Eſq; - *Appellant;*
Alexander Abercrombie, of Tullibodie, Eſq; *Reſpondent.*

18th March 1722-3.

Negotiorum Geſtor.—The reſpondent having ſent money by the appellant, to be by a third perſon laid out in ſtock, in his own name; on the death of this third perſon the appellant could not warrantably lay out the reſpondent's money in ſtock, in his the appellant's name.

Proof.—In this caſe the ſon of the perſon deceaſed, having by letter given the firſt notice of the tranſaction to the reſpondent, and mentioned that the appellant had informed the writer of the letter, that he had given the reſpondent his option to ſtand to the bargain or not, this letter is held to be proof of ſuch option tendered.

IN Auguſt 1720, ſome communications took place between the appellant and reſpondent, relative to the inveſting of money in the public funds. The appellant being about to ſet out for London, the reſpondent delivered to him two York Buildings Co. bonds of 100*l.* each, with an open letter, addreſſed to William Baird, of Auchmedden, Eſq., then in London: This letter was of the following tenor: "Edinburgh, 9th Auguſt, 1720. Dear "Couſen, Receive from the bearer Mr. Thomas Rigge of "Mortoun, advocate, two York Buildings bonds of 100*l.* ſterling "each, bearing intereſt ſince 23d February laſt, payable 23d "inſt.; the intereſt is 6l.; the one is marked letter A. (No. 9.) "the other is marked letter A. (No. 309.) I have filled up your "name in the indorſation (*a*) becauſe I deſign you ſhould put it "in ſtocks for me till I raiſe more. If South Sea ſubſcriptions "can be purchaſed at 5, or 6, or 7 hundred, for ſo much ready "money, Mr. Rigge will join the equivalent ſum of mine in "ready money; and if you can procure us credit, if he deſire "it for the ſurplus value of a ſubſcription, I ſhall make the "credit good as you, and he ſhall adjuſt the ſum, either upon our

(*a*) Theſe bonds were payable to bearer, and needed not indorſement.

"bond

" bond or bill payable in three months. But if you think South " Sea too high, then I deſire you may purchaſe as many ſhares " in the York Buildings as ſo much ready money, or, if you get " credit, for as much more as that will purchaſe; and if Mr. Rigge " join with you for the value of ready money in credit, let us " have as many ſhares in the York Buildings as can be.

" If Mr. Abercrombie of Glaſſaugh, or you will take the burden " with him for me, for the ſaid value, or for four or five hundred " pounds, I ſhall make it good, and nobody needs ſcruple his ſe- " curity. What ever ſtock you put the money in, let me have the " ſhare, or the transfer in my own name, becauſe I reſolve to " ſtand to it, eſpecially if it be York Buildings, whereas thoſe " upon the place may incline to ſell frequently; and I am not " ſure, but I may come up myſelf, or at leaſt remit you more " money. Let me have your anſwer upon receipt hereof." When the appellant arrived in London, he found Mr. Baird, to whom the letter was addreſſed, at the point of death.

The reſpondent received a letter from the appellant, dated at London, the 23d of Auguſt, 1720, informing him that his friend Mr. Baird was dead, and that he, the appellant had made no bargain for himſelf, becauſe he thought the ſtocks would fall lower. And upon the 9th of September the reſpondent received a letter dated at London the 3d of that month, from Mr. Baird the ſon of the deceaſed, acquainting him of his father's death, and that the appellant told him, he had bought South Sea Stock at 780*l.* per cent, and was willing the reſpondent's money ſhould be in there or not, as he the reſpondent pleaſed; and Mr. Baird mentions that he had not called for the reſpondent's money from the appellant, but that it was ſafe in the appellant's hands. About this time ſecured the great fall of South Sea Stock.

The reſpondent on the 12th of September wrote both to the appellant, and to Mr. Baird; he told the appellant that having heard of his friend's death, and the ſurpriſing turn of the Stocks, he did not incline to meddle with South Sea Stock; and that he had written to Mr. Baird, jun., not to diſpoſe of his bonds in the South Sea. The reſpondent afterwards received a letter from Baird, dated 20th of September, acquainting him, that the appellant had got payment of the two bonds from the York Buildings Company. The reſpondent on the 29th of September, wrote to the appellant requiring his bonds; or his money to be ſent back immediately: and ſoon after he received a letter from the appellant, without date, but appearing to have been written about the end of September, or beginning of October, mentioning another letter formerly written by him to the reſpondent, but never received, by which letter the appellant ſaid he wrote the reſpondent, that his money was put in with the appellant's own in South Sea Stock at 780*l.* per cent., including the dividend, by the advice of Alexander Abercombie, of Glaſſaugh, Eſq., and Mr. Baird, jun., on the 31ſt of Auguſt.

The reſpondent brought his action before the Court of Seſſion againſt the appellant, to have the money from the ſale of the

two bonds, repaid with intereſt from the time they were diſpoſed of by the appellant; *Firſt*, becauſe Mr. Baird being dead the appellant had no commiſſion to diſpoſe of the two bonds: *Secondly*, becauſe the commiſſion was not executed in the terms of his letter to Mr. Baird, for the ſtock bought with his money, was taken in the name of Mr. Rigge. The appellant made defences to this action, and the Court on the 12th of July 1722, "found "that Mr. Baird of Auchmedden, being dead, the appellant had "no power to uplift the money from the York Buildings Com- "pany:" and in purſuance of this interlocutor the Lord Ordinary on the 14th of ſame month, "decerned in terms of the lybel."

The appellant having reclaimed, inſiſting that it was the cuſtom of the York Buildings Company to pay their bonds to the bearer without indorſation, or any other title, and that he according to that cuſtom got payment of the bonds, and diſpoſed of the money for the reſpondent's uſe as *negotiorum geſtor*: after anſwers for the reſpondent the Court on the 24th of November 1722, "found that Mr. Baird of Auchmedden, being dead, the "appellant might warrantably uplift the money, and employ it "for the reſpondent's behoof as a *negotiorum geſtor*; but found "that the documents produced do ſufficiently make it appear, "that he employed the money and made a bargain in his own "name, that he gave the reſpondent an option whether he "would accept of the bargain or not, and that the firſt intima- "tion of the bargain, appears to have been made by a letter from "London (*a*), dated 3d September, and that the reſpondent by "his letter dated from Tullibodie, the 12th of September hav- "ing declined to accept the barg in, he was not *in mora*, nor "bound thereby." The appellant reclaimed againſt the laſt part of this interlocutor, inſiſting that he did not give the reſpondent his option; that this option was only mentioned in the letter from young Baird, and that it could only be proved *ſcripto vel juramento* of the appellant: and the reſpondent having petitioned againſt the firſt part of the interlocutor; after mutual anſwers for the parties, the Court on the 15th of December 1722, "found that the appellant having taken ſtock in his own name, "though for the behoof of the reſpondent, this was not to be "reckoned warrantably done, tanquam *negotiorum geſtor*, in caſe "by the forms the right to the ſtock could have been ſtated in the "reſpondent's perſon, by taking it in his name though abſent "without a letter of attorney; but if it could not be ſo taken, "found in that caſe, ſtock might warrantably be taken in the "appellant's name, for the behoof of the reſpondent; and found "that the letters produced, ſufficiently inſtruct, that the appellant "gave the reſpondent his option, whether he would accept the "bargain as for his behoof or not, and adhere to that part of "their interlocutor, finding that the firſt intimation appears to "have been made by a letter from London, 3d September: and "that the reſpondent by his letter dated at Tullibodie, 12th

(*a*) The letter from Mr. Baird junior.

"Septemben

" September, having declined to accept the bargain, he was not " *in mora*, or bound thereby." And in purſuance of this interlocutor, the Lord Ordinary on the 19th of December 1722, " decerned for 203*l.* ſterling, of principal and intereſt due 31ſt " Auguſt 1720, contained in the ſaid two York Buildings Bonds, " with the intereſt of the ſaid ſum, ſince the ſaid 31ſt of Auguſt."

The appellant having preſented another reclaiming petition after anſwers, the Court on the 9th of January 1723, " adhered " to that part of the interlocutor of the 15th of December, find- " ing the letters produced ſufficiently inſtruct that the appellant " gave the reſpondent his option whether he would accept of the " bargain as for his behoof or not; and adhere to that part of the " ſaid interlocutor, finding that the firſt intimation appears to be " made by a letter from London, dated September 3d, and that " the reſpondent by his letter dated at Tullibodie, the 12th of " September, having declined to accept of the bargain, he was " not *in mora* or bound thereby; and found that this point de- " termining the cauſe, there was no neceſſity to determine how " far the appellant's acting in this affair *tanquam negotiorum geſtor* " was warrantable."

The appeal was brought from " an interlocutory ſentence or " decree of the Lords of Seſſion of the 12th of July, and from " part of an interlocutor, of the 24th of November, and from " certain interlocutors of the 15th and 19th of December 1722, " and 9th of January 1723." Entered 18 Jan. 1722-3.

Heads of the Appellant's Argument.

The acting for the behoof of the abſent, and *ejus nomine*, is always reckoned one and the ſame thing; if the *animus* and intention of the mandator are anſwered, it is not material by what perſon. The order was to put the money in South Sea, or York Buildings Stock; this was indiſpenſible, as being the ſubject of the mandate, and it could not warrantably have been put in any other ſtock: but as to the *modus* or taking the ſecurity, that does not alter the caſe unleſs the reſpondent will ſhew any prejudice done him by not taking the Stock in his own name; for it was more convenient to take it in the appellant's name, and ſaved the expence of two transfers and letters of attorney, one to accept, and the other to ſell, before the arrival of which from Scotland the market might have been loſt.

As the perſon to whom the mandate was given, was dead, it could not be executed by him; and the appellant employed his friend's money, as he did his own, with no other view but to ſerve him; and if ſtocks had riſen, then the reſpondent would have had the advantage. But the reſpondent did not anſwer the letters for three poſts waiting to ſee whether ſtocks would riſe or fall; if they had riſen, then no doubt he would have acknowledged the appellant's good offices.

It does not appear by any legal proof, that the appellant gave the reſpondent an option to be concerned in the ſtocks or not; only Mr. Baird wrote to him, that the appellant had ſaid ſo; but this

this is not ſufficient; it can only be proved *ſcripto vel juramento* of this appellant himſelf. Beſides in the ſame letter Mr. Baird ſays "you muſt by firſt poſt let Mr. Regge know which of the "two offers you accept of;" ſo that ſuppoſing ſuch choice had been really given to the reſpondent, yet he was *in mora* in not anſwering Mr. Baird's letter of the 3d till the 12th of September, which came to his hands only on the 17th.

Heads of the Reſpondent's Argument.

The reſpondent never gave any commiſſion to the appellant, either to buy ſtocks for him, or to take up his money from the York Buildings Company; the only perſon he entruſted with the management of his money was the late Mr. Baird of Auchmedden. The only truſt committed to the appellant was to carry up his money to London, to be forthwith delivered to Mr. Baird. And though the interpoſition of a *negotiorum geſtor* may be allowed in ordinary affairs, yet the reſpondent believes no man will be allowed to *game* or practiſe *ſtock-jobbing* with another perſon's money, without an expreſs commiſſion directly given to him for ſo doing.

Though the reſpondent had expreſsly entruſted the appellant with the management of his money, yet he was not bound to take a ſhare of any bargain made by the appellant, unleſs the appellant had given him immediate notice thereof by ſuch a writing under his hand, as would have obliged the appellant by the laws of Scotland to have given the reſpondent a ſhare of the profits, in caſe any had ariſen from ſuch bargain; and the appellant never having given any ſuch notice to the reſpondent, it would be hard to oblige him to take any ſhare of the loſs, ſince he was no wiſe entitled to any ſhare of the profit in caſe any had ariſen.

As ſoon as the reſpondent had any notice that the appellant pretended he had made any bargain upon the reſpondent's account, though the notice was ſent by a third party, and three days after the pretended bargain was made; yet the reſpondent was ſo diligent as to write by the very next poſt to the appellant, declaring that ſince his friend whom he had entruſted was dead, he would have nothing to do with the ſtocks nor venture any of his money that way.

Judgment, 18 March 1723. After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutory ſentences or decrees therein complained of be affirmed: And it is further ordered that the appellant do pay or cauſe to be paid to the reſpondent the ſum of* 20l. *for his coſts by reaſon of the ſaid appeal.*

For Appellant, *Rob. Raymond. Sam. Mead.*
For Reſpondents, *Dun. Forbes. Will. Hamilton.*

Elizabeth Ducheſs Dowager of Hamilton and Brandon, - - - *Appellant;*

James Duke of Hamilton and Brandon, and Alexander Gillies, - - - *Reſpondents.*

Caſe 100.

21ſt *May* 1723.

Fiar and Life-renter.—The Court of Seſſion having found, that a fiar had the right to cut and fell woods growing on part of an eſtate, that was life-rented, the judgment is reverſed.

IN 1693, William, Duke of Hamilton, and Anne, Ducheſs of Hamilton, executed an entail of all their eſtates, ſettling the ſame upon themſelves, and the longeſt liver of them in life-rent, whom failing to James Earl of Arran, their eldeſt ſon, and the heirs male of his body; with ſeveral other ſubſtitutions of heirs, and with prohibitory, irritant, and reſolutive clauſes againſt ſelling or contracting debt; but it contained a power to the ſaid Earl of Arran to grant a life-rent proviſion and jointure, out of any part or portion, or out of the whole lands and barony of Kinneill, Carridden, Abbotſcars, and Lockhouſe (which had formerly been the ſeparate eſtate of the ſaid Anne, Ducheſs of Hamilton, and of which the Earl of Arran was then in poſſeſſion for his maintenance) in favour of a wife or wives whom the ſaid Earl ſhould marry, not exceeding the ſum of 1500*l.* ſterling of yearly rent; provided the ſaid William Duke of Hamilton, if then in life, ſhould be conſenting to ſuch marriage, and ſhould join in the ſettlement of ſuch life-rent, proviſion, and jointure. In July 1694, this entail was duly recorded in the regiſter of entails.

A marriage being intended between the ſaid James Earl of Arran, (afterwards Duke of Hamilton) and the appellant, the Earl, on the 15th of July 1698, executed a bond of proviſion or jointure to the appellant, whereby, after reciting the ſaid entail, and the power thereby reſerved to him, he obliges himſelf to provide and ſecure the lands and barony of Kinneill, with the caſtles, towers, fortalices, houſes, yards, parks, woods, foreſts, fiſhings, &c. in life-rent to the appellant, and to warrant the ſaid lands and premiſes to have been worth, and to have paid for ſeveral years before, and to be worth and pay yearly during the ſaid life-rent the ſum of 1500*l.* And in a marriage-contract of ſame date, this life-rent proviſion was accordingly ſettled in theſe terms.

James, Duke of Hamilton, however, not having been infeft at that period in the premiſes, it became neceſſary that the ſettlement ſhould be confirmed by Anne, Ducheſs of Hamilton, his mother. And on the 30th of March and 20th of April 1702, another

another deed was executed by James, Duke of Hamilton, with conſent of his ſaid mother in favour of the appellant reciting the foreſaid bond and obligation entered into by the ſaid Duke, and in implement and corroboration thereof, diſponing and conveying the ſaid lands and barony of Kinneill, with the parks, woods, and collieries to the appellant in life-rent, in caſe ſhe ſhould ſurvive the Duke, her huſband. Upon this laſt deed ſaſine was taken in favour of the appellant, and duly recorded. And after the death of her huſband in 1712, the appellant entered to and had ſince poſſeſſed the ſaid premiſes granted to her in life-rent.

In January 1722, the reſpondent, the duke, and his curators, entered into an agreement with the other reſpondent, Gillies, to which the appellant was not a party, whereby they ſold and diſponed to the ſaid reſpondent, Gillies, all the growing timber in the wood and parks of Kinneill (adjoining to which was the only houſe which the appellant had upon her life-rent eſtate) conſiſting of oak, aſh, birch, elm, alders, and other timbers, with liberty to cut the ſame at the times in the ſaid agreement mentioned, to the effect the ſaid Gillies might cut down and diſpoſe of the ſame, as alſo the graſs in the ſaid wood before the axe, with power to build houſes in the ſaid parks for the conveniency of the woodcutters; and with an obligation that the gates of the ſaid parks ſhould, during that term of years, be open to the ſaid Gillies at pleaſure, and that he ſhould have free paſſage through any part of the ſaid parks for carrying away the timber, bark, &c. In conſideration thereof the ſaid Gillies bound himſelf to pay 900*l.* at the ſeveral times therein mentioned.

Gillies accordingly cut down part of the ſaid wood; but when ſeveral perſons to whom he had ſold the ſame, came to carry it away, the appellant ordered the gates to be ſhut, prohibited Gillies from cutting any more trees, and would not allow any perſon to go near the ſaid woods, and brought a ſuſpenſion againſt Gillies before the Court of Seſſion.

The reſpondents, the duke and Gillies, thereupon applied to the Court of Seſſion, ſtating the circumſtances of the caſe, and praying that the gates and paſſages might be opened, and that their lordſhips would diſcharge all obſtructions and interruptions to the regular cutting and carrying away of the woods in terms of the foreſaid agreement. The appellant having made anſwers, the Court, on the 12th of July 1722, "found that the reſpon-
"dent, Gillies, ought to be allowed to carry off and diſpoſe of
"ſo much of the ſaid wood and bark as he had then cut, on his
"giving ſecurity to pay the value to the appellant or reſpondent,
"which of them ſhould be found to have beſt right in the event,
"and give ſecurity to fence ſufficiently that ground whereon the
"wood he had cut was growing; and for that effect ordained the
"appellant to cauſe make open the entries and paſſages, that the
"ſaid Gillies might have acceſs to carry off the ſaid cut wood
"and bark in the ſame way as before the ſaid paſſages were of
"late

" late ſhut up and ſtopt, and declared the value of the cut wood " ſhould be ſubject to the making up to the appellant the damages " ſhe had ſuſtained, or might ſuſtain, ſo far as in the event it " ſhould be found ſhe ought to have been *indemnis*, and remitted " to the Lord Ordinary to hear procurators for the appellant and " reſpondents concerning the right to the wood by them reſpec- " tively pretended, and ſtopped further cutting in the mean " time." And after another petition for the reſpondents with anſwers thereto, the Court, on the 27th of July 1722, " granted " liberty to the reſpondent, Gillies, to proceed in cutting down " what remained to be cut of that year's diviſion, upon giving " ſecurity as aforeſaid."

The reſpondent, the Duke, alſo brought his action of declarator to have it found, that he only had a right to cut the ſaid wood; and after defences for the appellant, and a hearing in preſence, the Court, on the 25th of January 1723, " found that the ap- " pellant, the life-rentrix, might uſe the woods of Kinneil for " her proper uſes, and for keeping in repair the houſes on the " lands of Kinneil, which ſhe life-rents; but that ſhe had no " right to cut or diſpoſe of the ſaid woods by ſale or other- " wiſe, and remitted to the Lord Ordinary to proceed ac- " cordingly."

The cauſe being accordingly heard before the Ordinary, his lordſhip, on the firſt of February 1723, " found that the appel- " lant muſt allow the reſpondent and the ſaid Alexander Gillies, " and the perſons employed by him, free paſſage in cutting and " carrying away the ſaid wood and timber thereof, and to proceed " in cutting of the ſaid wood, and executing the haill powers " granted to the ſaid Alexander Gillies by the contract made " concerning the cutting of the ſaid wood, carrying away the " timber thereof, and the whole other powers in the ſaid contract " contained, and diſcharged the appellant to obſtruct or hinder " the ſame; and found and declared, at the reſpondents' inſtance, " conform to the concluſion of the ſaid ſummons of declarator " againſt the appellant, and the interlocutor of the Lords in pre- " ſence, and ſuſpended the letters at the appellant's inſtance " againſt the ſaid Alexander Gillies, and decerned in the above " terms; but found that the reſpondent muſt make up to the ap- " pellant what prejudice ſhe ſhall ſuffer in the graſs, through " cutting and carrying away the ſaid wood and timber thereof, " and by the ſtraying of cattle through the keeping of the gates " and paſſages open; and that he muſt either leave ſo much of " the woods ſtanding as may anſwer the uſes competent to her as " life-rentrix, in terms of the interlocutor in preſence, or furniſh " her with other timber in place thereof."

The appeal was brought from " an interlocutory ſentence or " decree of the Lords of Seſſion of the 25th of January 1723." Entered 28 Feb. 1722-3.

Heads

Heads of the Appellant's Argument.

The appellant having the lands and barony of Kinneill, and parks and woods ſecured to her for life, the Duke of Hamilton (*a*), who has the reverſion, cannot enter thereupon, or cut or diſpoſe of any wood growing upon the ſame without her conſent. And the appellant is in a much ſtronger caſe than if ſhe had only a life-rent in the lands; becauſe the very woods themſelves are expreſsly made over to her in life-rent, which ſhe is adviſed does entitle her to cut and diſpoſe of thoſe woods in a proper courſe, if the ſame happen to be fit for cutting during her life, becauſe otherwiſe the conveyance of the woods can have no meaning at all; and conſequently for the duke to diſpoſe thereof, is to take to himſelf part of the profits to which the appellant is entitled.

If the appellant be not entitled to cut or diſpoſe of the ſaid wood for her own uſe and profit, yet at leaſt the reſpondent can have no power during her life to cut the ſame, and thereby not only to deprive her of the ornament and ſhelter the ſaid wood gives to her dwelling-houſe, but to render the park (to which her right is undoubted) uſeleſs and unprofitable to her for a term of years, that may be as long as her life. But the decree ſeems inconſiſtent with itſelf, ſince it finds that the appellant may uſe the woods for her proper uſes, and for keeping in repair the houſes on the lands which ſhe has for her jointure; and yet decrees, that the Duke of Hamilton may cut or diſpoſe of the ſame woods by ſale or otherwiſe.

It was contended for the reſpondent, that the late Duke of Hamilton, by the entail of his eſtate, was ſo tied up, that he could make no jointure to a lady exceeding 1500*l.* per annum, and that the rent of the barony of Kinneill, over and above the woods, extends to that ſum; and therefore that the appellant cannot be underſtood to have got a right to cut and diſpoſe of the woods. But the appellant's right flows from Anne, Ducheſs of Hamilton, who was under no limitation, as well as from the late duke. And the limitation in the entail concerns only the rents of lands, but there is no reſtriction as to the power of diſpoſing of woods. If the rents of the appellant's life-rent eſtate were higher (as they are not) than the ſum which the late duke was empowered to grant by way of jointure, the reſpondent may take his remedy ſo far to avoid the ſettlement by due courſe of law, but cannot ſeize the appellant's park, deſtroy the wood, and render it uſeleſs on pretence her jointure is too large. But the decree over-rules this objection; for it preſuppoſes and admits that the appellant has a life-rent in the woods, though it deprives her of the benefit of it.

(*a*) It is nowhere ſtated in either of the Caſes, whether or not the appellant was the reſpondent, the duke's mother; but from Douglas's Peerage it appears that ſhe was ſo.

Heads

Heads of the Reſpondents' Argument.

As the law does not give the mere life-renter any power of cutting woods, ſo the inſerting of the words "*the woods*" in the bond of proviſion is only in courſe of ſtile, amongſt other pertinents of the eſtate granted, and cannot give any power inconſiſtent with the right of the life-renter: the import can only be that the appellant may have the uſe of them for neceſſary repairs; eſpecially ſince a life-renter is, by ſeveral acts of parliament in Scotland, directed to find ſecurity not to cut the woods. The wood in queſtion is not underwood, or *ſilva cædua*, to be cut by yearly proportions, but is ſuch a wood as is cut only once in 40 or 50 years: woods of that kind are *pars ſoli*, and do not belong to the life-renter, that would be giving the appellant an advantage that was not at all intended for her. 1491, c. 25. 1535, c. 15.

The late Duke of Hamilton had no power to ſettle a jointure but what was given to him by the deed of entail; in that he is reſtricted to ſettle a jointure out of *the lands and barony of Kinneill*, without any mention of woods; and if therefore the inſerting the woods in the bond of proviſion, could be conſtrued to be of any import, they are beyond the power which the duke had, and conſequently of no effect. The late duke by the ſaid entail, could not provide a jointure exceeding 1500*l.* per annum; and the appellant has ſo much excluſive of the woods, conſequently there is no reaſon for the appellant to claim the profit of theſe woods.

The appellant contended, that this entail was not compleated in the late duke's perſon by infeftment, and the late ducheſs, (whoſe the eſtate was,) having joined with the duke in this bond of proviſion to the appellant; whatever they granted to her ought to be effectual, eſpecially ſince infeftment was made to her prior to any ſaſine upon the entail. The act of parliament 1685, concerning entails does indeed require the irritant clauſes to be inſerted in the procuratories of reſignation, precepts of ſaſine, &c. but no where declares them of no force if no infeftment is made; on the contrary it expreſsly ſays, "That the original entail once "produced before the Lords of Seſſion judicially, and recorded "in the regiſter appointed for that effect, the entail ſo inſert "ſhall be real and effectual not only againſt the contraveners and "their heirs, but alſo againſt their creditors and other ſingular "ſucceſſors, whether by legal or other conventional titles." And the conſequence is, that this ſettlement being recorded is binding upon the appellant. Beſides, the appellant had full notice of this entail; it is expreſsly recited and taken notice of in her bond of proviſion, and the jointure granted in purſuance of the power thereby given to the late duke; if then he had no power to ſettle the woods, as he had not, then the appellant can have no claim thereto.

Nor will it alter the caſe, that the late Dutcheſs of Hamilton joined in the ſettlement upon the appellant; ſhe was but a life-rentrix at that time, and ſhe conveys nothing but only conſents to the ſettlement made by her ſon. It is to be remarked that the appel-

appellant has brought no action to have her right to cut the woods eſtabliſhed.

Notwithſtanding the ſettlement of a jointure, the fiar has a power to cut the woods, becauſe otherwiſe the woods upon the eſtates that are life-rented might become altogether uſeleſs, and decay, by not being cut when at a proper growth; and indeed this is the caſe of the woods in queſtion, for if they are not cut they will in a little time be good for nothing. It is the undoubted law of Scotland, that the fiar has the power of cutting the woods; thus the learned Craig L. 2. Dieg. 8. pag. 189. Says "Neque enim "unquam tertia terræ impedimento fuit Domino, quo minus "univerſam ſuam Silvam vendere potuit, quod nuper inter Ram- "ſeum de Dalhouſſie, & Mariam Ballandinam, prædeceſſoris "ſui conjugem, factum vidi." He likewiſe ſays, "That even the "grantee of the life-rent eſcheat has no power to cut woods:" and thus the judges determine in all ſuch like caſes.

Since the reſpondent, the duke, has a right to cut, he muſt alſo have the uſe of the ways and paſſages, becauſe neceſſary to his right; but the decree has abundantly provided a ſatisfaction to the appellant for any loſs ſhe may ſuſtain thereby, which ſatisfaction is to be paid in the firſt place out of theſe woods.

As theſe woods will neceſſarily decay and grow good for nothing if not now cut, ſo it would ſeem unreaſonable that had the appellant any right to hinder the reſpondent from cutting them, ſhe ſhould do it, under the notion of the pleaſure of the woods in a place where ſhe has not been two months in ten years, that ſhe has been in poſſeſſion of the eſtate; and the reſpondent would be as far from deſtroying the pleaſure of that place as the appellant; but he juſtly apprehends that if the wood be not cut, the pleaſure will be deſtroyed, eſpecially as one-ſixth of the whole is now cut. If the reſidue be cut, in a very few years it will be more pleaſant than now.

The reſpondent is very far from calling in queſtion, or endeavouring to diminiſh the appellant's jointure. His father had a power of ſettling 1500*l. per annum*; and the appellant is in poſſeſſion of that income, excluſive of the woods. The reſpondent did before the Court agree, that ſhe ſhould have 1500*l. per annum*, and if there ſhould be any deficiency in the rental, that he ſhould make it up to the appellant.

Judgment, 21 May 1723. After hearing counſel, *It is ordered and adjudged, that the ſaid interlocutory ſentence or decree be reverſed.*

For Appellant, *Ro. Dundas. P. Yorke.*
For Reſpondents, *Dun. Forbes. C. Talbot. Will. Hamilton.*

Simon Lord Lovat, - - *Appellant*; Caſe 101.
Hugh, the Son of Alexander Mackenzie of Fraſerdale, ſtiling himſelf Hugh Maſter of Lovat, - - - *Reſpondent.*

22 *May* 1723.

Life-rent Eſcheat.—Aliment of the Fiar.—An eſtate being ſettled by entail, upon a perſon in life-rent, and a certain ſeries of heirs in fee, with the burden of an aliment to the firſt ſubſtitute: the life-renter forfeits his life-rent eſcheat for treaſon; and the Court of Seſſion having, in a competition with the donator, granted an aliment to the fiar, their judgment is reverſed.

AFTER the determination in the two former appeals, a new queſtion aroſe between the appellant, the grantee of the life-rent eſcheat of Alexander Mackenzie of Fraſerdale, the forfeiting perſon, and the reſpondent, the eldeſt ſon of this Alexander Mackenzie, and of Emilia, the heir female of the family of Lovat, who ſtiled herſelf Baroneſs of Lovat.

By the deed of entail executed by Lord Preſtonhall in 1706, in the laſt appeal mentioned, he ſettled the eſtate of Lovat upon Alexander Mackenzie, the forfeiting perſon, his ſon, in life-rent, and upon his grandſon the reſpondent, and the heirs male of his body, in fee, with ſeveral other ſubſtitutions of heirs: and the deed contained this condition and proviſo, *inter alia*, That the life-rent of the ſaid Alexander ſhould "be ſubject to and with the "burden always of alimenting and educating the ſaid Hugh "Maſter of Lovat" (the reſpondent) "and other heirs of tailzie "above mentioned, according to their rank and quality." And in the charter and ſaſine ſubſequently obtained, the ſaid proviſions and conditions are repeated.

In April 1721, the reſpondent Hugh, by his father and curator Alexander Mackenzie of Fraſerdale, who had then received his majeſty's pardon, brought his action againſt the appellant before the Lords of Seſſion in Scotland, inſiſting that the life-rent of the ſaid Alexander Mackenzie had been burdened with the alimenting of the reſpondent; and the appellant having come in the place of the ſaid Alexander, the reſpondent ought to be alimented by him.

The appellant made defences, and after a hearing of the cauſe, the Court, on the 6th of February 1722, "Found that the re-"ſpondent is entitled to an aliment out of the eſtate of Lovat, "whereof he is fiar." The appellant having reclaimed, after anſwers for the reſpondent, the Court, on the 24th of February 1722, "found that the reſpondent the fiar of the eſtate of Lovat "is entitled to have an aliment out of the rents of the eſtate of "Lovat, which was life-rented by the ſaid Alexander Mackenzie, "and whereto the appellant had right as donator of the ſaid "Alexander Mackenzie's life-rent eſcheat; and allowed to either

" party a conjunct probation to prove the yearly rent of the ſaid " life-rented lands and deductions, and granted warrant for let- " ters of diligence to that effect."

Accordingly a proof was taken, by which it appeared that the appellant was in poſſeſſion of the eſtate of Lovat, the yearly rent of which amounted to 10,000 merks, free of all burdens; and on the 11th of December 1722, the Court modified 2000 merks of " yearly aliment to the reſpondent, to commence from the " date of the ſummons of aliment, on the 12th day of April " 1721; and remitted to the Ordinary on the bills to allocate " lands, out of which the ſame ſhould be uplifted by the purſuer " himſelf, free of all public burdens."

In purſuance of this remit, the Lord Ordinary on the bills, on the 26th of the ſame month of December, allocated to the reſpondent the lands of Ingliſton, Kirkton, Grolin, Fingaſk, and the mains of Lovat, to be poſſeſſed by him during his father's life, in payment of the ſaid aliment.

Entered, 17 Jan. 1722-3. The appeal was brought from " two interlocutory ſentences or " decrees of the Lords of Seſſion of the 24th of February 1722, " and 11th of December thereafter."

Heads of the Appellant's Argument.

There is no colour or pretence in the law or practice of Scotland, for compelling the ſuperior or his grantee, in whoſe hands lands are, by the forfeiture of his vaſſal's life-rent eſcheat, to allow any aliment to ſuch vaſſal's heir, or to the fiar, where the forfeiting perſon is tenant for life only; no caſualty of ſuperiority is more frequent in Scotland than that of life-rent eſcheat, and yet no ſingle inſtance can be produced, where a claim of this nature was ever inſiſted on, or ſuſtained.

The obligation which lay upon the forfeiting perſon to aliment the reſpondent was purely perſonal, and could not have afforded any real action againſt the eſtate of the forfeiting perſon prior to the forfeiture; wherefore by the law of Scotland, it cannot affect the appellant's giſt, which is preferable to every claim that did not afford a real action againſt the eſtate prior to the forfeiture.

As this is the undoubted law of Scotland, ſo it has been declared by the judgments on the two former appeals; the firſt of which decreed, that the eſtate in the appellant's poſſeſſion ſhould be chargeable with ſuch debts only as were real, and did by the law of Scotland affect the ſame at the time of the forefeiture; and the ſecond adjudged, that the debt due to Alexander Mackenzie of Garloch, though made a burden on the forfeiting perſon by the conditions of the ſettlement of the eſtate, as being a debt of the grantor's, was not real, ſo as to be preferable to the appellant, becauſe it yielded no real action againſt the eſtate at the time of the forfeiture. Now if real debts only in this ſenſe can affect the eſtate, it is impoſſible that the reſpondent's claim, which was no more than an illiquid demand upon his father, and

did

did not at all affect the eſtate, can be preferred to the appellant's right.

The reſpondent's claim prior to the forfeiture was ſo unſettled and weak, that even the perſonal creditors of Roderick Mackenzie, the maker of the ſettlement, muſt, by the law of Scotland, have been preferred to it: Now the appellant's right having already been found by the Houſe of Lords effectual to exclude thoſe perſonal creditors, who have the very ſame proviſion made in their favour by the ſettlement of the eſtate as the reſpondent has, it cannot well be imagined for what reaſon the reſpondent's claim, which is leſs effectual than that of thoſe other creditors, ſhould be preferred to the appellant's grant.

Suppoſing an aliment had been due, which it is conceived was not, the moſt the Court could have done, was to have decreed the appellant to have paid the ſum modified, upon which proper proceſs might have iſſued. But, before the appellant was in contempt, to have turned him out of poſſeſſion, and to have decreed that the reſpondent ſhould be put in poſſeſſion of lands, ſuch as he thought fit to name, lying in the neighbourhood of the appellant's dwelling-houſe, appears to be an act in itſelf unreaſonable, and very greivous to the appellant; tending like the other decrees already reverſed, to render his majeſty's grant altogether ineffectual to him.

Heads of the Reſpondent's Argument.

The aliment and maintenance of the reſpondent the minor was, by the expreſs appointment of the donor, who gave the life-rent of this very eſtate to the forfeiting perſon, charged upon that life-rent, and was an inſeparable condition upon which it was granted; conſequently the grantee could not have that life-rent but with its burden, viz. the aliment of the reſpondent the minor. And this is the ſtronger, ſince the life-rent of Mr. Mackenzie, was not a reſerved life-rent, but a life-rent conſtituted by the voluntary deed of ſettlement of the reſpondent's predeceſſor, to whom he muſt have been heir. Nor can this be looked upon to be only a perſonal obligation upon Mr. Mackenzie to maintain his heir; becauſe the grantor of that very life-rent to Mr. Mackenzie, has charged that life-rent with this aliment, and it was a condition upon which his life-rent was to ſubſiſt.

The reaſon for preferring the appellant to the creditors was, that their debts not being particulary mentioned, and ſpecified in the deed of ſettlement, did not infer any real charge upon the eſtate in prejudice of the grantee, as they were not made real by diligence before the grant was made: but this does not meet the caſe in queſtion, becauſe the burden of the aliment of the reſpondent is particularly mentioned, and the life-rent ſubjected to it Beſides the aliment could never be made more real upon the life-rent than it was; it being both a condition, and a burden, upon the life-rent eſtate, and conſequently upon the profits of that eſtate in the hands of the grantee.

Judgment, 22 May 1723. After hearing counſel, *It is ordered and adjudged, that the interlocutory ſentences or decrees complained of in the ſaid appeal be reverſed.*

For Appellant, *Rob. Raymond, Dun. Forbes.*
For Reſpondent, *C. Talbot. Will. Hamilton.*

Caſe 102. Alexander Mill of Hatton, William Roſs, and David Butter, Baillies of the Town of Montroſe, for themſelves and other Magiſtrates of the ſaid Town, - - *Appellants;*

Colonel Robert Reid and Others, Members of the Town Council of the ſaid Burgh, *Reſpondents.*

23d *May* 1723.

Member of Parliament.—In an action to reduce the election of certain magiſtrates of a royal burgh, on account of the impriſonment of certain of the electors by the provoſt, who was a member of parliament: the provoſt's privilege of parliament could not be pleaded to ſtop the declarator againſt the other defenders, as not elected by a ſufficient quorum:

And the provoſt's privilege of parliament could not ſtop the purſuers from inſiſting upon the reaſon of reduction, that ſome of the electors were unwarrantably impriſoned by the provoſt.

Burgh Royal.—It was relevant to annul the election of magiſtrates, that the provoſt had unwarrantably impriſoned ſome of the electors, during the time of the election, with an intention to prevent their giving their votes at that election.

THE town of Montroſe, by the ſet or conſtitution of the burgh, was governed by a town council, conſiſting of 19 members, viz., a provoſt, three baillies, a dean of guild, a treaſurer, a maſter of the hoſpital, 10 common council-men, who are merchants, and two other common council-men, who are tradeſmen. This town council was elected annually about Michaelmas by the old council; ſeven of them being continued for the year following, and 12 new ones being choſen.

On Wedneſday preceding Michaelmas day 1722, an election was held for the ſaid burgh, at which James Scott, Eſq. of Logie, a member of parliament was choſen provoſt, the appellants baillies, and certain other perſons, councillors of the ſaid burgh; but the reſpondents, who were aggrieved by the election thus made, ſoon after brought an action of reduction and declarator againſt the ſame before the Court of Seſſion. The circumſtances of the caſe as ſtated by the reſpondents were:

That the method of election was that, upon the day of election, all the magiſtrates and councillors ſhould meet in the town-houſe, or at leaſt a majority of the whole, being 10, and there the old council elected the new, the provoſt, the 3 baillies, the dean of guild,

guild, treaſurer, and maſter of the hoſpital, for that year, being *ex officiis* continued members of the council for the enſuing year:

That at the Michaelmas election 1722, James Scott Eſq. of Logie, the then provoſt, and the appellants, were anxious to continue themſelves, and their friends in the management: but finding that the majority of the then town council, would be for bringing in a new ſet of burgeſſes, they reſolved to prevent ſome of the councillors, who would not fall in with their meaſures from coming to the election; and in order thereto, the then provoſt, on the morning of election, ordered four of the councillors to be carried to priſon, upon pretence of ſome perſonal inſult or diſreſpect to himſelf: and moſt of the councillors, thinking the liberties and privileges of the burgh infringed by this mode of proceeding, abſented themſelves from this pretended meeting; but ſent Mr. Muriſon one of their number, to proteſt againſt the illegal practices thereof:

That the appellants and their aſſociates finding their number was but eight, reckoned Mr. Muriſon, (who went there only to proteſt againſt their proceedings) as the ninth; and to make up the tenth, they made one of their friends appear as proxy, for one of the abſent councillors, without any warrant or order for ſo doing; and then choſe a new town council:

That Mr. Muriſon proteſted againſt all theſe illegal proceedings, and demanded that the four councillors who was impriſoned ſhould be liberated, before they proceeded to an election, and offered caution for their appearance to anſwer to any crime with which they ſhould be charged, which was refuſed: and immediately after this irregular election was over, the four councillors were ſet at liberty; and were never afterwards proſecuted for the crimes alleged againſt them: and as ſoon as theſe four were liberated, eleven members of the town council, being a majority of the whole, met and proceeded to a due and regular election of magiſtrates and councillors for the enſuing year.

The appellants made defences, that the action being brought to overturn the election of Mr. Scott, of Logie, as provoſt, and the other magiſtrates of the town, upon an alleged act of violence committed by Mr. Scott, the reſpondents could not proceed in their action againſt Mr. Scott, becauſe of his privilege of parliament; nor againſt the appellants, who were the other defenders, becauſe they were in ſociety together, and therefore no action could lie againſt them, unleſs Mr. Scott was made a party.

The cauſe being heard before the Lord Ordinary, his lordſhip on the 22d of December 1722, "Siſted proceſs againſt the ſaid "Mr. Scott, during his privilege of parliament; but ſuſtained "proceſs againſt the appellants; and before anſwer allowed the "reſpondents to prove their libel, that there was not a quorum "at the election, and that there were four of the town council in "priſon at the time of the election." And on the 27th of the ſame month his lordſhip "ſuſtained proceſs againſt all the de"fenders, and allowed a proof to be led againſt them, and againſt "Mr. Scott."

The appellants having reclaimed, a hearing was had in presence of the whole Court, and on the 8th of January 1723, their lordships "found that Logie's privilege could not be pleaded to stop "the declarator againſt the other defenders, as not elected by a "ſufficient quorum." A ſecond reclaiming petition was preſented, upon which a freſh hearing was had, and the Court on the 19th of January 1723, "found that Logie's privilege could not ſtop the "purſuers from inſiſting on that reaſon of reduction of the "other members, viz. that ſome of the members of the council "were unwarrantably impriſoned by Mr. Scott of Logie." And by another interlocutor of ſame date, they "found it re- "vant to annul the election of the other members, that Logie un- "warrantably impriſoned ſome of the members of the counc- "during the time of the election."

Entered 8 Feb. 1722-3.

The appeal was brought from "the interlocutory orders of the "Lords of Seſſion in Scotland of the 8th and 19th of January "1723."

Heads of the Appellants' Argument.

It ſeems very unreaſonable to oblige the appellants to juſtify an act of Mr. Scott's, when at the ſame time there can be no proceedings againſt Mr. Scott himſelf. He may have very good reaſons to allege in ſupport of what he did, of which the appellants may be entirely ignorant; or ſuppoſing they ſhould be acquainted with them, they may not be furniſhed with proper vouchers for juſtifying them; and therefore the appellants ſhould not be obliged to plead to the action, till Mr. Scott can be regularly proceeded againſt. It is not ſo much as charged by the reſpondents, that the appellants were concerned with Mr. Scott, or acceſſary to the illegal act ſaid to be committed by him; and it is at leaſt a very new method of proceeding to compel the appellants to juſtify this act, at the hazard of loſing their right, when not only the principal, but the only actor cannot be proceeded againſt.

Suppoſing the fact were proved againſt Mr. Scott, yet it ſeems highly unreaſonable, that any act of his to which the appellants were not at all acceſſary, ſhould be made uſe of to ſet aſide the election of the appellants. Every man ought to ſuffer for his own faults; and therefore it is hardly to be conceived how Mr. Scott's act can affect the appellants. The caſe is the ſame as if Mr. Scott had not been preſent at the election, and the other electors had proceeded to make a choice without him, that election no doubt would have been good; how, then can the preſence of Mr. Scott againſt whom there may be an objection upon a fact committed by him only, be made uſe of as a handle to ſet aſide the act of election, which of itſelf can ſubſiſt without the intervention or preſence of Mr. Scott?

The reſpondents contended that it is ſufficient in order to avoid the election, to inſiſt that ſome of the members of the council, and the electors were unwarrantably detained, nor was it of any moment by whom, or by whoſe directions they were ſo detained. But were this reaſon ſufficient, it would be in the power

power of any perſon though not an elector, by unwarrantably detaining any one of the electors, to ſet aſide every election of magiſtracy, and introduce the greateſt confuſion. It would be the more unreaſonable in this caſe, becauſe neither by the law, nor the conſtitution and practice of this burgh, is any particular number of electors neceſſary to be preſent when an election is made; the day for the election is fixed for the Wedneſday before Michaelmas, and the perſons elected by the majority of the electors then preſent, are, and always have been, conſidered as duly and regularly elected: and the appellants were, accordingly, without any acceſſion to any unwarrantable act upon their part, regularly elected by the majority of the electors preſent on the proper day, and in the proper place appointed for that purpoſe.

Heads of the Reſpondents' Argument.

The Lords of Seſſion allowed of Mr. Scott of Logie's privilege of Parliament as a protection to himſelf, without entering into any diſpute, whether that privilege could protect him againſt any action brought againſt him as a member of a corporation; and the reſpondents conceive that he could not by ſuch privilege protect his fellow magiſtrates and councillors from the juſt ſuit of the reſpondents; there being nothing more common, where members of parliament are jointly or ſeverally bound in bonds with other perſons, than the bringing actions againſt the other perſons bound, though no action be commenced againſt the members upon account of their privilege.

Though by the written ſet of the town, no quorum was expreſsly fixed, yet cuſtom and reaſon determined, that no number of the council under ten, which is a majority of the whole could proceed to do buſineſs, more eſpecially buſineſs of ſuch weight as the election of a new town council, for if any leſſer number ſhould be allowed, it would be impoſſible to determine where to ſtop, or why two or three met together in the council-houſe may not be a *quorum*, and have a power to elect a new town council, or determine buſineſs of the greateſt conſequence to the town: The appellants indeed founded upon a precedent in 1719, where there were but eight preſent at the election of a new town council, and where they choſe proxies for two more to make up the number ten; but no argument could be brought from this precedent, ſince they could not ſhew that it was ever practiſed before or ſince.

It appears from the very facts themſelves, that the four members were impriſoned, in order to influence the election, and to prevent a majority of the town council's being againſt the provoſt and his friends, which would have happened if a free election had been allowed; for the appellants themſelves acknowledge, that ſix or ſeven of the council were walking in the ſtreets, and would not come up to the place of election; which number, with the four that were impriſoned, would have made a majority of the town council; but by this act of Mr. Scott's he procured himſelf to be elected as provoſt, and his other friends to be brought in as magiſtrates or councillors for the year following. And, there-

fore, though the appellants had been entirely ignorant of the impriſonment of the four councillors, yet their own election being the effect of this act of violence, ought to be declared void; for in ſuch caſes *non quæritur an is cui convenitur, an alius, vim facit.*

The appellants were all acceſſary to this illegal act, in ſo far as they openly and knowingly took advantage of it to get themſelves elected as magiſtrates and councillors. And particularly the appellant Mr. Mill, as a magiſtrate, was acceſſary thereto, he being one of the magiſtrates of the town at that time. Though the council, as ſuch, have no juriſdiction, yet Mr. Mill, as a magiſtrate, might have joined with Mr. Muriſon, who was another magiſtrate, then preſent, and they two as ſuch might have liberated the impriſoned members upon giving good bail, which privilege ought not to be refuſed to any ſubject, who is not impriſoned for ſome heinous crime.

Judgment, 23 May 1723.

After hearing counſel, *It is ordered and adjudged, that the interlocutory order of the 8th of January be affirmed; and it further ordered and adjudged, that the interlocutory order of the 19th of the ſame January, whereby the Lords of Seſſion found, "that Logie's "privilege could not ſtop the purſuers from inſiſting in the reaſon of "reduction of the election of the other members, that Logie unwar-"rantably impriſoned ſome of the members of the council during the "election," be affirmed; and as to the ſecond interlocutory order, of the ſame date, it is further ordered and adjudged, that it is relevant to annul the election of the other members, that Logie unwarrantably impriſoned ſome of the members of the council during the time of the election, "with an intention to prevent their giving their "votes at that election;" and with this variation and addition the ſame laſt mentioned interlocutor is hereby affirmed.*

For Appellants, *Dun. Forbes.* *Will. Hamilton.*
For Reſpondents, *Rob. Raymond.* *Will. Fraſer.*

Ex parte

Alexander Abercromby, Eſq; of Glaſshaugh, for himſelf and the other Creditors of Alexander Wilſon of Littlefield, deceaſed, *Appellant*; Case 103.

John Innes of Knockorth, and Lewis Donaldſon, Writer in Edinburgh, Son, Heir, and Executor of John Donaldſon, deceaſed, - - - - *Reſpondents.*

31ſt *Jan.* 1723-4.

Truſt.—Truſtees choſen by creditors, who had a ſalary for their trouble, having thrown the debtor into priſon on a caption, but afterwards liberated him without applying to the creditors for their conſent; the debt being afterwards loſt, it was relevant to make the truſtees liable for the debt that they conſented to the debtor's liberation.

ALEXANDER WILSON of Littlefield, being greatly in debt to ſeveral perſons at the time of his death, his creditors agreed to appoint truſtees for the purpoſe of taking joint meaſures for recovery of their claims. The reſpondent John Innes, and John Donaldſon, father of the reſpondent Lewis, were appointed ſuch truſtees, and they were to be allowed not only their expences, but an allowance for their trouble. In January 1707 theſe truſtees were accordingly confirmed executors creditors to the deceaſed, and poſſeſſed themſelves of conſiderable part of his eſtate.

One Robert Saunders, late provoſt of Banff, being indebted to the deceaſed in the ſum of 2000 merks, the truſtees raiſed and carried on an action againſt him for the ſame, whereupon he was thrown into priſon. Afterwards the truſtees, without conſulting the other creditors, releaſed him from priſon, without taking any ſecurity from him for the money due. Saunders ſome years after became inſolvent, and the debt was totally loſt.

The other creditors thereupon brought an action againſt the truſtees, to compel them to render their accounts, and pay what was due by them. In this action the creditors inſiſted, that the truſtees ſhould be charged with the ſaid debt of 2000 merks due by the ſaid Saunders, in regard they had by a regular proceſs thrown him into priſon, and had afterwards liberated him without the conſent of the creditors, whereby the debt was loſt. After ſundry proceedings upon this point, the Lord Ordinary, upon the 29th of January 1715, "Found the truſtees' conſent to Provoſt Saunders' liberation relevant to make them liable for the debt."

The truſtees thereupon offered to prove, that Provoſt Saunders had paid one-half of the debt to Wilſon, the deceaſed, in his lifetime; and the Lord Ordinary, on the 1ſt of February 1715, ſuſtained this defence of payment as relevant to be proved, and gave

the truſtees till the 20th of that month to make proof thereof. No proof, however, was made upon this point, but the truſtees preſented a reclaiming petition to the Court, praying to be relieved of the whole demand upon aſſigning to the creditors an adjudication they had obtained againſt Provoſt Saunders. The appellant ſtates, that the intereſt of the creditors not being properly attended to, no anſwers were made to this petition, and the Court, on the 18th of February 1715, "ſuſtained the ſaid article of diſcharge, "the ſaid truſtees diſponing the adjudication againſt Saunders in "favour of the creditors."

The truſtees afterwards made propoſals to end all the matters in diſpute amicably by a ſubmiſſion; but this not taking effect, the appellant, on behalf of himſelf and the other creditors of Wilſon of Littlefield (*a*), preſented a petition to the Court, praying to have the cauſe re-heard, and the laſt mentioned interlocutor altered; but after anſwers, the Court, on the 29th of November 1719, refuſed the "deſire of the petition;" and to this interlocutor the Court adhered on the 1ſt of December thereafter.

Entered, 23 Oct. 1722.

The appeal was brought from "ſeveral interlocutory ſentences "or decrees of the Lords of Seſſion of the 18th of February "1715, the 29th of November, and 1ſt of December 1719."

Heads of the Appellant's Argument.

The truſtees were appointed for the behoof of all the creditors, and were to have a conſiderable allowance for their encouragement, and conſequently were to uſe exact diligence in recovering the debts due to Wilſon, and to account for the ſame to the creditors.

The truſtees regularly took out proceſs againſt Provoſt Saunders on his bond for 2000 merks, and laid him in priſon by a caption. He was afterwards ſet at liberty by the truſtees, without any directions from the creditors. Saunders at that time was in very good circumſtances, being poſſeſſed of a pretty good real eſtate, and of a perſonal eſtate of conſiderable value; and had he been detained in priſon ſome time longer, and other proper methods then taken, the truſtees might no doubt have recovered payment of the debt. The creditors, therefore, having loſt this debt, which was the great fund of their payment, by the negligence of the truſtees, the loſs ought not to affect the creditors, but the reſpondents ought to ſtand charged with it.

The adjudication obtained by the truſtees is an additional proof of their miſmanagement; for that adjudication was not obtained till four years after he was diſmiſſed out of priſon, during all which time Saunders lived in good credit; but in February 1711, his affairs falling into diſorder, the truſtees adjudged his eſtate, after ſeveral other creditors had done the ſame, whereas if they had done it about the time he was ſet at liberty, the debt might probably have been paid.

(*a*) It does not apear how the appellant's right from the other creditors was conſtituted.

Counſel

Counſel appearing for the appellant, but no counſel for the reſpondents, and the appellant's counſel being heard, *It is ordered and adjudged, that the interlocutory ſentences or Decrees of the 18th of February 1715, the 29th of November and 1ſt of December 1719, complained of in the ſaid appeal, be reverſed; and that the interlocutor of the 29th of January 1715, be affirmed: and it is further ordered and adjudged, that the Lords of Seſſion do proceed in the cauſe, in ſuch manner as if the ſaid interlocutors complained of had never been made.* Judgment, 31 Jan. 1723-4.

For Appellant, - *Will. Hamilton.*

John Earl of Breadalbane, Sir James Sinclair of Dunbeath, and John Sinclair of Ulbſter, Eſq; - - - *Appellants;*

Alexander Earl of Caithneſs, - - *Reſpondent.* Caſe 104.

20th *March* 1723-4.

Reduction Improbation.—In an action, where various objections were made to the purſuer's title, the Court having ordered production to be made, and afterwards granted certification; the judgment is reverſed, and it is ordered that the defenders be not obliged to take a term for production, until the purſuer make out his title, upon which he founds his ſuit.

Usury.

IN 1719, the reſpondent brought an action of reduction improbation againſt the appellants before the Court of Seſſion, in which he inſiſted for production of the rights and titles by which the appellants held or claimed the lands of Ormly, Slebſter, milnlands and multures thereof, the towns and lands of Shanwell and Acharraſkell, with the teinds and pertinents of the ſame; which had been part of the eſtate of Sir James Sinclair of Murkle, deceaſed. The circumſtances of the caſe which gave riſe to the action, as ſtated by the reſpondent, were:

That the reſpondent was the lineal deſcendant and heir of Sir James Sinclair of Murkle, who was heir of George late Earl of Caithneſs, who died without iſſue; ſo that all the eſtate of Caithneſs would, by the courſe of law, have come to the reſpondent, as well as the honours; but this Earl George was prevailed upon, without any valuable conſideration, to make over his whole eſtate in Caithneſs to John late Earl of Breadalbane, deceaſed, the father of the appellant Earl John, ſubject indeed to a right of reverſion not expreſſed in the deeds of conveyance, but in a ſeparate deed, which was ſecreted, and which but lately came to the knowledge of the reſpondent:

That after the death of the ſaid George Earl of Caithneſs, the ſaid late Earl of Breadalbane poſſeſſed himſelf, not only of the whole eſtate of Caithneſs, which belonged to the ſaid Earl George, but

but alſo of the lands of Ormly and other lands in Caithneſs, which were part of the eſtate of the ſaid Sir James Sinclair of Murkle, under pretence that the ſaid late Earl of Caithneſs was in poſſeſſion of thoſe lands as a creditor of the ſaid Sir James Sinclair by a decree of appriſing; and the Earl of Breadalbane alſo got poſſeſſion of the writings of the family of Caithneſs, which occaſioned complaints to the privy council of Scotland, and to the parliament of that country; and which had ever ſince been the ſubject of law ſuits, though the low circumſtances of the Caithneſs family, and the minority of the preſent earl, hindered theſe diſputes from being brought to an iſſue:

That the reſpondent claimed a right to the ſaid lands of Ormly, &c. under a decree of appriſing, obtained by John Murray of Pennyland, with ſaſine thereon, and which, after ſeveral meſne conveyances, was veſted in the reſpondent: and ſome years ago, endeavours were uſed to ſettle differences between the reſpondent and the appellant the Earl of Breadalbane; but the other appellants, Sir James and John Sinclair, on purpoſe to prevent any agreement, in 1718 purchaſed the ſaid lands of Ormly and others from the Earl of Breadalbane; but as the claims of the reſpondent were no ſecret, the Earl of Breadalbane was ſo cautious, as not to bind himſelf in warrandice of the purchaſe, but, on the contrary, the purchaſers became bound to indemnify him.

To this action the appellants made defences; and the circumſtances which gave riſe to the action, as ſtated by them, were: That in October 1672, George late Earl of Caithneſs, by deed for a valuable conſideration, conveyed to the late Earl of Breadalbane all the lands and eſtate in Caithneſs, particularly the lands of Ormly and others (before mentioned); in 1673 a charter of the premiſes was granted by the crown, upon which ſaſine was taken:

That part of theſe lands had formerly been the eſtate of Sir James Sinclair of Murkle, grandfather to the reſpondent; but being much encumbered, the ſeveral real ſecurities affecting the ſame, which greatly exceeded the value of the eſtate, had been purchaſed by the ſaid George Earl of Caithneſs, ſome time before the ſaid ſale, and theſe incumbrances were likewiſe aſſigned to the Earl of Breadalbane: and the reſpondent's father, by deed in 1677, reciting that his eſtate was under great encumbrances, and that the Earl of Breadalbane had right to the lands of Ormly and others part of the premiſes by appriſings and otherwiſe, therefore obliged himſelf, his heirs and ſucceſſors, never to quarrel, queſtion, or impugn his rights to the ſaid lands:

That as the Earl of Caithneſs had been in quiet poſſeſſion of the premiſes for ſeveral years before 1672, ſo the late Earl of Breadalbane, and the appellant the earl his ſon, had continued in quiet poſſeſſion of the premiſes ever ſince; and in 1718, the earl, for a valuable conſideration, ſold the premiſes and all other his eſtates in Caithneſs to the appellants Sir James and John Sinclair:

That

That one John Murray, for a debt of the ſaid Sir James Sinclair of Murkle, of 6000 merks Scots, in 1652 got a decree of appriſing of the lands of Ormly and others, part of the premiſes, and likewiſe of other lands, part of the ſaid Sir James Sinclair's eſtate, and thereupon took infeftment; but there being ſo many prior encumbrances upon that part of the eſtate conveyed to the Earl of Breadalbane, and of greater extent than the value of the lands, no poſſeſſion was attained, by virtue of that decree, of any part of the premiſes conveyed to the Earl of Breadalbane; and the reſpondent having renounced to be heir to his father and grandfather, procured right to this old dormant appriſing, and, under colour thereof, brought the preſent action.

The appellants in defence, at firſt, contended, that the right under which the reſpondent claimed was preſcribed, no poſſeſſion having been attained of any part of the lands in the poſſeſſion of the appellants in 40 years after the date of the reſpondent's right: but the reſpondent offering, before the production of the deeds, to prove that ſeveral ſteps had been taken to prevent his claim from being preſcribed, the Court, on the 2d of December 1720, "Found the allegation of preſcription againſt the reſpondent's "title, where the reſpondent offered to prove interruption during "the running of the term to be aſſigned for production, could "not ſtop the appellants taking a term to ſatisfy the pro-"duction."

It was then inſiſted by the appellants, that the decree of appriſing was uſurious, as having been taken for compound intereſt, and that it was therefore null and void. But after anſwers for the reſpondent, the Court, on the 4th of January 1721, "repelled the objection proponed againſt the reſpondent's title, "that the appriſing is uſurious, and found that the reſpondent's "title is ſufficient to oblige the appellants to take a day to pro-"duce the right called for."

It was next inſiſted, that the appriſing under which the reſpondent claimed was led for a debt due by his grandfather, to whom he was heir apparent; that the reſpondent had been in poſſeſſion of ſeveral of the lands contained in the appriſing for a great many years, and that by his receipt of the rents the debt appriſed for was more than paid; and this the appellants offered to prove by the reſpondent's oath; and if this were ſo, they contended that the reſpondent had no right to oblige the appellants to produce any of the deeds. The Court, on the 11th of January 1721, "Found that the appellants' objection againſt the appriſing "which is the reſpondent's title in this proceſs, that the reſpon-"dent has been in the poſſeſſion of the ſubject appriſed of ſuch "extent and for ſo long ſpace as the free rents of the ſaid ſubject "intromitted with by the reſpondent, did exceed the ſums in the "appriſing, is in this ſtate of the proceſs competent to be proved "inſtantly by the reſpondent's oath." But the reſpondent having reclaimed, inſiſting that his poſſeſſion of the lands contained in the appriſing was not by virtue of this deed of appriſing only, but by virtue of other rights and diligences in his perſon, and therefore

fore that his receipt of the rents was not to be imputed only to the ſatisfaction of the decree in queſtion. After anſwers for the reſpondents, the Court, on the 7th of February 1721, "adhered "to their former interlocutor of the 11th of January 1721, with "this variation, that it be proved by the reſpondent's oath, whe-"ther his poſſeſſion was by virtue of the aforeſaid appriſing." And the appellants having reclaimed, the Court, on the 18th of February, "adhered to their former interlocutors of the 11th of "January and 7th of February 1721."

The appellants were then directed to produce the deeds, and acts for the firſt and 2d term were pronounced, and they produced certain of the deeds called for; but not having made a complete progreſs of writs, the Court, on the 27th of December 1721, "granted certification againſt the appellants, and reduced "and improved the writs called for, and that for not production "and decerned."

The appellants againſt this interlocutor preſented two petitions, one of them ſtating that certain witneſſes had not been examined, and craving further time for that purpoſe; the other ſtating that the Earl of Breadalbane was in England, and there had been no opportunity to ſearch his repoſitories, and praying that extract might be ſtopped till the 1ſt of June next. The Court, after anſwers for the reſpondent, on the 31ſt of January 1722, "ſtopt "extracting the decree of certification till the 15th of February "thereafter."

Entered, 22 Feb. 1721-2.

The appeal was brought from "ſeveral interlocutory ſentences "of the Lords of Seſſion of the 4th of January, the 7th and 18th "of February 1721, the 27th of December 1721, and 31ſt of "January 1722."

Heads of the Appellants' Argument.

A bare ſuppoſitition that the reſpondent's title might not be preſcribed, was not a ſufficient reaſon to decree the appellants to produce the ſeveral titles under which they claimed. It had been much more juſt, when this objection was ſtated, to have conſidered that point firſt; for if it was with the appellants, there was then an end of the action; and to what purpoſe ſhould the appellants be obliged to enter into an expenſive action, and to produce their title deeds, when probably it may be found that the reſpondent, the purſuer, has no title at all. And though the interlocutors finding the appellants muſt take a term to produce their rights, proceed on the ſuppoſition that the reſpondent was before the ſame term to prove interruptions; yet the decree of certification is pronounced againſt the appellants without the reſpondent's having proved any of theſe ſuppoſed interruptions.

There is the leſs reaſon to indulge the reſpondent in this caſe, becauſe he is the heir of the original debtor, and refuſes to enter heir to him, and be ſubjected to his debts; but has purchaſed for a ſmall ſum this old dormant appriſing, and would, under colour of that, defeat the appellants and others, who are juſt and lawful creditors of his predeceſſors: great care ought, then, to have been taken,

taken, that the title under which he claims ſhould be clear and ſubject to no exception; becauſe, if the appellants ſhould be obliged to produce their title deeds, and that to a perſon who has no right, it may afford an opportunity to the heir to look into all the appellants' title deeds, which being appriſings, conſiſt of many different particulars, and if, through the injury of time, or any other accident, any of them ſhould be wanting, it may afford him a handle to overturn the moſt ancient ſettlements, and diſappoint the payment of juſt creditors. As heir at law, he is not entitled to this, without ſubjecting himſelf to the payment of his predeceſſors' debts; if, therefore, an heir at law in the ſhape of a creditor make this demand, it ought firſt to be aſcertained, that he is a really a true creditor, before he has this fruit by his action (*a*).

The appellants ought either to have been let into a proof of the reſpondent's poſſeſſion, and receipt of the rents and profits of part of the lands mentioned in his appriſing, in order to extinguiſh his demand, or otherwiſe he ought to have made oath upon that ſingle point.

Nor can it alter the caſe, that the reſpondent pretended to have other titles, to the ſatisfaction of which he could impute his receipt of the rents; for theſe titles ought certainly to have been produced in order to ſatisfy the Court that they were of validity. Nor could it be ſufficient for the reſpondent to make oath, that he had other titles, without obliging him to condeſcend upon and produce them, for that is admitting him to be judge for himſelf; and probably theſe other titles may be void too; and it is ſufficient for the appellants to retain the poſſeſſion they have, and likewiſe their deeds, till once the reſpondent ſhew, that he has a title to call theirs in queſtion; and it is impoſſible to determine that before they be produced.

It would be hard that the appellants, Sir James and John Sinclair, becauſe the other appellant the earl, from whom they purchaſed, was neceſſarily out of the kingdom, whereby they could not have an opportunity of ſearching for the papers that were wanting, ſhould be for ever debarred from producing or making uſe of theſe deeds, which was the effect of the decree of certification, by which means the rights which they have as honeſt and juſt creditors, might be entirely fruſtrated.

Heads of the Reſpondent's Argument.

The preſcription alleged by the appellants was interrupted, both by his minority and by ſeveral proceſſes, which he immediately made appear in part by writings produced in this ſuit, and offered to bring a further proof, if neceſſary, againſt the time the appellants ſhould produce their titles.

The objection made by the appellants, that the appriſing was ſatisfied by receipt of rents, could not in form be proponed or

(*a*) The appellants alſo ſtate the grounds on which they contended that the decree of appriſing was uſurious, and therefore null: the reſpondent gives a counter ſtatement; but nothing can be given diſtinctly upon this point; theſe ſtatements are therefore omitted.

inſiſted

inſiſted upon before the appellants produced their titles. The reſpondent was ready to make oath, if the appellants would be determined by his oath, whether or not the ſums in the appriſing were paid; but the objection, in the form it was proponed by the appellants, was inſufficient in law; for although he ſhould acknowledge he had poſſeſſed lands contained in the appriſing, the profits of which, ſince his poſſeſſion, might exceed the ſums thereby decreed, yet that would be no proof that theſe ſums were paid in ſatisfaction of that appriſing, becauſe he might and did poſſeſs thoſe other lands by other titles than this appriſing, which titles he would produce at a proper time, after the appellants had produced theirs. And after the interlocutors directing that this fact ſhould be proved by the reſpondent's oath, at a calling of the cauſe on the 24th of February 1721, his counſel repreſented, that he was ready and willing to make oath upon the points referred to his oath; but the counſel for the appellants, who inſiſted to have his oath only to protract the ſuit, *declared they did paſs from his oath in that ſtate of the proceſs.*

Judgment, 20 March 1723-4.

After hearing counſel, *It is ordered and adjudged, that the ſeveral interlocutory ſentences complained of in the ſaid appeal, except ſo much of the interlocutor of the 4th of January 1721, as relates to the objection made by the appellants to the appriſing, under which the reſpondent claims upon pretence of its being uſurious, and allowing too much intereſt, be reverſed: and it is further ordered, that the Lords of Seſſion, in the further progreſs of the cauſe, do not oblige the appellants to take a term for production, until the reſpondent, the purſuer below, ſhall have made out his title upon which he founds his ſuit.*

For Appellants, *Rob. Raymond. Dun. Forbes. Will. Hamilton,*
For Reſpondent, *Ro. Dundas. C. Talbot.*

The queſtion upon the firſt appeal between Sir Hew Dalrymple and the Hon. Mrs. Fullarton, relative to the eſtate of Bargeny, 18 Dec. 1797, was upon a point very much like the preſent; and the judgment then pronounced was of the ſame import as that in the preſent caſe.

A ſimilar judgment to this is given in a reduction improbation brought by an heir, Duff of Braco and others *v.* Earl of Buchan, on appeal, 15 April 1725.

Ex parte

Alexander Murray, of Broughton, Eſq; - *Appellant*; Caſe 105.

Captain James Butler, Nephew and Heir of Sir George Maxwell of Orchardton, and the Creditors of the ſaid Sir George, - *Reſpondents*.

Kaims, 15 Dec. 1724.

21ſt *March* 1723-4.

Solidum et pro rata.—A debtor grants bond with a cautioner, and afterwards a bond of corroboration with a different cautioner; the money is paid by the cautioner in the corroboration; but he had only relief againſt the cautioner in the original bond for one half of the ſum paid.

IN September 1674, Sir Alexander MacCulloch, and Godfrey his eldeſt ſon as principals, and Sir Robert Maxwell of Orchardton as cautioner, executed a bond to Alexander MacGhie for 2000 merks Scots.

After the death of Sir Alexander MacCulloch, the money not having been paid, the ſaid Godfrey, then Sir Godfrey his ſon as principal, and Alexander Viſcount of Kenmure, and Richard Murray of Broughton, (the appellant's father), as cautioners, in October 1679, executed a bond of corroboration to the ſaid Alexander MacGhie, reciting the original bond, and that the creditor was contented to delay payment upon granting to him ſuch corroborative ſecurity: therefore the ſaid principal and cautioners, in further corroboration of the ſaid bond, and without hurt or prejudice thereto, or derogation therefrom in any ſort, *ſed accumulando jura juribus*, bound and obliged themſelves to make payment of the ſaid principal ſum, with intereſt from Martinmas 1679, and this bond of corroboration contained an obligation from the principal to the cautioners for their relief and indemnity.

The money not being paid, the creditor brought his action before the Court of Seſſion, againſt the appellant as ſon and heir to the ſaid Richard Murray; and the appellant was decreed to pay the principal ſum and intereſt, for which his father had become ſecurity. The creditor in the ſaid bonds thereupon aſſigned the ſame to him for his relief againſt the other perſons bound.

The appellant brought his action before the Court of Seſſion, for payment of the ſaid ſum of 2000 merks Scots, and intereſt contained in the original bond; to which action the reſpondent Butler, and ſome of the creditors of Sir George Maxwell, ſon and heir of Sir Robert Maxwell, the cautioner in the original bond, became parties. In this action the appellant contended, that he was cautioner or ſecurity for the payment of the money due by the original bond, and that as to him, all the perſons bound therein were principals; and he having paid the money, was entitled to relief, and to recover his payment from all or any

of the ſaid perſons. On the part of the reſpondents, it was anſwered, that Sir Robert Maxwell was only a cautioner, and that the appellant's father could only have relief of the one half of the ſum he had paid, as he was equally bound for the debt.

The Lord Ordinary, on the 29th of November 1721, "Found "that the appellant could only have relief for the half of the "ſum he had paid to the creditor." And to this interlocutor the Court adhered on the 15th of December 1722, and 18th of June 1723.

Entered, 21 Jan. 1723-4.

The appeal was brought from "an interlocutor of the Lord "Newhall, Ordinary, of the 29th of November 1721, and the "affirmances thereof by the Lords of Seſſion the 15th of De-"cember 1722, and 18th of June 1723."

Heads of the Appellant's Argument.

The very title of the bond of corroboration, as well as the ſtile, expreſs the mind and intention of the parties contracting to have been, and the terms under which they became bound import, that it is granted to the creditor as a further ſecurity of the former bond. The principal and cautioners in the firſt bond became all as principals with regard to the perſons bound as cautioners in the corroboration, who thereby became cautioners to the creditor for them. The firſt bond continued to all intents and purpoſes the ſame as before; and the bond of corroboration was only given as a further ſecurity to the creditor, in caſe the principals and cautioners in the firſt bond ſhould become inſolvent. But in caſe the creditor ſhould compel the cautioners in the bond of corroboration to pay the debt, then they were to be relieved by the perſons for whom they were bound as cautioners, both principals and cautioners in the original bond being bound for their relief. It is certain, that if the cautioners in the firſt bond had paid the debt, they could only have taken an aſſignment for their relief againſt the principals, and could never have had acceſs againſt the perſons bound in the corroboration, who were only cautioners for them. Had the appellant, when he paid the bond, taken any aſſignment in the name of a third party, the reſpondent the heir muſt then, without queſtion, have paid the debt, and had relief only from the principals, for whom his anceſtor was cautioner. So the Court had found in parallel caſes, particularly *Clarkſon againſt Edgar*, 1ſt December 1703, and *Brock againſt Lord Bargeny*, 14th February 1705. This is agreeable both to law and equity; for the bond of corroboration was a tranſaction directly with the creditor, and only for his advantage, without the leaſt intention of any alteration in the firſt bond, or beneſit to the parties bound in it, except to procure from the creditor a larger time for them to pay the debt.

Judgment, 21 March 1723-4.

This day having been appointed for hearing the cauſe *Ex parte*,

Counſel for the appellant only attending, they were called in and heard, and withdrew; and after due conſideration and debate had of the merits of this cauſe,

It

It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the ſaid interlocutor, and affirmances thereof, therein complained of, be affirmed.

For Appellant, *Dun. Forbes. Will. Hamilton.*

Charlotta, Marchioneſs Dowager of Annandale, - - - *Appellant*; Caſe 106.

James, Marquis of Annandale, John Baillie, Francis Holliday, and many others, claiming to be Creditors of William, late Marquis of Annandale, deceaſed, - *Reſpondents.*

21ſt *March* 1723-4.

Forum competens—Juriſdiction.—The Marchioneſs of Annandale, reſiding in England, being appointed executrix for behoof of her children, proves the late Marquis's will in England: various perſonal creditors of the late Marquis, arreſt in the tenants' hands, a jointure payable to the executrix out of the Scots eſtates: the Court of Seſſion having ordered her to purge the arreſtments, before ſhe drew her jointure: the judgment is reverſed, and it is ordered that the arreſtments be looſed without caution or conſignation.

AFTER the determination of the appeal relative to the jointure or life-rent of 1000*l.* ſterling, between the appellant, and the reſpondent the marquis, on the 15th of December 1722, the appellant returned to the Court of Seſſion to have that judgment of the Houſe of Lords applied in her favour. What aroſe out of the proceedings had thereupon gave riſe to the preſent appeal.

The late marquis, by a will executed on the 29th of December 1720, but a ſhort time before his death, nominated the appellant his executrix and univerſal legatee in truſt for the behoof of their ſon Lord George, then born, and of any other children that might be procreated between him and the appellant, with a proviſo, that the appellant's right of adminiſtration ſhould continue only during her widowhood, and after her marriage devolve upon ſuch perſons as he ſhould appoint for the ſole uſe of his ſaid children; and it was alſo declared, that the executrix ſhould be bound to pay all his lawful executry and perſonal debts, in which Lord Johnſtone, his eldeſt ſon, was not bound, and which were contracted ſince the 1ſt of April 1690, the date of his tailzie. The appellant proved this will in the prerogative court of Canterbury, and poſſeſſed herſelf of the teſtator's perſonal eſtate to a conſiderable amount. Several of the reſpondents, ſtating themſelves to be creditors of the teſtator for debts contracted in Scotland, ſince April 1690, exhibited their bill in the Court of Chancery againſt the appellant for diſcovery of aſſets, and ſatisfaction of their claims. To this bill the appellant put in her anſwer; and afterwards filed a croſs bill againſt the preſent

marquis and the plaintiffs in the original bill, for a diſcovery of the reality of their debts.

In this ſtate matters were when the appellant, in terms of the ſaid judgment of the Houſe of Lords, 15th December 1722, applied by petition to the Court of Seſſion, to have proper diligences directed for payment of the arrears of her annuity of 1000*l.* with intereſt, and of the future payments, yearly and termly as they ſhould fall due. This petition was remitted to the Lord Ordinary, to hear parties thereupon; and before him the counſel for the preſent marquis, ſtated, that the arrears of the life rent were arreſted in his hands by ſeveral perſons claiming to be creditors of the appellant, as executrix of her late huſband for large ſums of money. The Lord Ordinary gave a decree for poinding of the ground, until the appellant ſhould be paid off her life-rent annuity in terms of the order and decree of the Houſe of Lords; but "ſuperſeded extract until the ſaid arreſtments were purged."

The appellant reclaimed to the Court, ſtating, that ſhe had proved the will in England only, and poſſeſſed the aſſets in that country, and never intromitted with any of the effects of the late marquis in Scotland, where the preſent marquis had been confirmed executor to his father, and had taken poſſeſſion of the perſonal eſtate; and inſiſting that ſhe was not liable to account in Scotland for the Engliſh aſſets; and that her life-rent annuity ought not to be ſtopped by theſe arreſtments; and therefore praying that the arreſtments might be looſed without caution or conſignation. The marquis and the creditors made anſwer, and the Court, on the 13th of February 1722-3, "adhered to the interlocutor of the Lord Ordinary, and refuſed the deſire of the petition."

The appellant afterwards brought an action before the Court of Seſſion againſt the ſaid arreſtors, and all the other creditors of her late huſband whom ſhe could diſcover, for reducing the arreſtments, and concluding that it ſhould be declared, that her ſaid life-rent annuity was not arreſtable at the ſuit of any creditor of the late marquis, nor the appellant as executrix in truſt for her children liable to be ſued, or to account in any court in Scotland for the perſonal eſtate come to her hands in England. To this action the creditors made defences; and the Court, upon hearing the cauſe, on the 26th of December 1723, "ſuſtained the defences made for the defenders, and found the arreſtments on the dependance ſufficiently warranted."

Entered, 21 Jan. 1723-4.

The appeal was brought from "two interlocutors of the Lords of Seſſion of the 13th of February 1722-3, and 26th of December thereafter."

Heads of the Appellant's Argument.

All executors, eſpecially theſe in truſt, ought to be ſued, either in the country where they reſide, or where the eſtate, which is the ſubject of their adminiſtration, lies, and where the will is proved. The appellant has no reſidence in Scotland; ſhe only proved the will and poſſeſſed the eſtate in England; ſhe ought

not

not therefore to be ſued to account for that eſtate in any court of Scotland.

Although by the courſe of proceedings in Scotland, a creditor ſuing his debtor for his own proper debt, may arreſt ſuch debtor's own effects: yet it cannot be maintained, that the proper effects of an executor, or what he has in his own right, can be arreſted upon a pending ſuit for the debt of the teſtator; at leaſt not till ſuch debt can be eſtabliſhed, and a judgment recovered, finding the executor has effects ſufficient to anſwer the defunct's debt. Were this otherwiſe, an executor might by arreſtments be deprived of the uſe of every part of his own eſtate, till he had accounted with every ſingle creditor, and that poſſibly in ſucceſſive ſuits for the effects of the deceaſed, which in the appellant's caſe would be almoſt endleſs.

The creditors themſelves appear convinced that Lord George and Lord John Johnſtone, the appellant's ſons, ought to be made parties in any ſuit carried on againſt her for her accounting for her late huſband's effects, and have named them accordingly as parties in the ſuits below: but ſince her ſons have neither reſidence nor eſtate in Scotland, and cannot be ſued in that country, no ſuit can be carried on there againſt the appellant, to which they muſt neceſſarily be parties (*a*).

Since the appellant cannot be lawfully ſued to account in Scotland, her jointure cannot be arreſted on pretence of any ſuch pending ſuit, which never can be lawfully brought to an iſſue.

If ſuch proceedings be allowed, and the ſaid decrees be affirmed, the appellant may be ſued by multitudes of creditors both in England and in Scotland, to anſwer to each of them the ſame ſums, which might produce directly contrary decrees, not only the juriſdictions, but the rules of adminiſtering perſonal eſtates, being entirely different in the two kingdoms. By theſe means, the appellant might be decreed, without remedy, to pay the ſame aſſets and effects, to two different perſons, and without a poſſibility of bringing the different claimants into a court having a juriſdiction over both parties; and in the mean time her jointure muſt remain perpetually arreſted, or ſhe muſt ſubmit to pay the ſame ſums twice over.

The appellant in the mean time has by theſe arreſtments been kept out of her jointure above three years, been haraſſed with many ſuits, and left deſtitute of any means of ſubſiſtence. By her anſwer to the bill Chancery, it appears that the whole perſonal eſtate come to her hands amounts only to 4778*l.* 9*s.* 9*d.* Out of this ſhe has paid 2316*l.* 18*s.* 10*d.* and ſhe is ſued for a debt on bond of 2000*l.* of principal beſides intereſt.

Heads of the Reſpondents' Argument.

By the law of nations, wherever a perſon or his effects are found, they are ſubject to the laws of the country; and by the

(*a*) One of theſe ſons became afterwards Marquis of Annandale, and in a decree pronounced by the Court of Chancery (in the important queſtion with regard to his domicil) it was found that he was originally domiciliated in England.

undoubted law of Scotland, any creditor may arreſt the effects of his debtor or of any one againſt whom he has commenced an action. If an executor apply aſſets towards paying the debts of his teſtator whereſoever they are due, it will be a diſcharge to him whereſoever he is to account. In Scotland actions are daily brought againſt perſons living out of the kingdom, and their effects arreſted upon ſuch actions; but thoſe arreſtments are always looſed upon finding ſurety to anſwer to the value of the thing arreſted, in caſe the defender be caſt in the action: By the law of Scotland, all pleas and defences competent to the defender are entirely reſerved to him againſt the action, in like manner as is practiſed in England, where a perſon is arreſted before proof made of the debt.

It matters not, whether the appellant be executrix for her own benefit, or for that of the children, becauſe the creditors are to be diſcharged before any legacies be paid; and in caſe ſhe had applied any part of the aſſets to the uſe of her children before paying the debts, ſhe would be obliged by the laws of all nations, as well as thoſe of England and Scotland, to anſwer the ſame out of her own eſtate.

The creditors, who contracted with the late marquis in Scotland, are moſt ſolicitous to carry on their ſuits in their own country, where the forms are ſhort and the expences ſmall; and they demand no more than that the appellant account for what remains of the perſonal eſtate in her hands, not already applied to the payment of debts.

The condition of the creditors would be extremely hard, if they were to be diſappointed of this fund of the perſonal eſtate which is allotted by the teſtator for their payment, for the creditors can have no recourſe againſt the preſent marquis upon the real eſtate, which he poſſeſſes by virtue of an entail in 1690, prior to their debts, which therefore cannot be charged upon him, and which was the reaſon which moved the late marquis to make this expreſs proviſion for them in his will out of his perſonal eſtate.

Judgment, 21 March, 1723-4.

After hearing counſel, *It is ordered and adjudged, that ſo much of the ſaid interlocutor of the* 13th *of February* 1722-3, *and of a former interlocutor thereby referred to, as ſuperſedes extract of the decree for diſtreſs, till the arreſtments be purged, and alſo the ſaid interlocutor of the* 26th *of December* 1723, *be reverſed; and it is further ordered that the decree for poinding of the ground be forthwith given out by the proper officer, and put to execution, and that the arreſtments in queſtion be looſed without caution or conſignation, and that the Lords of Seſſion do give ſuch further directions as ſhall be juſt purſuant to this order.*

For Appellant, *P. Yorke.* *Ro. Dundas.*
For Reſpondents, *C. Talbot.* *Dun, Forbes.*

Colonel Francis Charteris, of Ampsfield, - *Appellant*; Cafe 107.
The Right Honourable James Earl of Hyndford, - - - - - *Reſpondent.*

23d March 1723-4.

Uſury.—South Sea Company.—During the rapid riſing of South Sea ſtock, an agreement was entered into, on a Sunday, to ſell a certain quantity of ſtock, at 90 per cent. above the price of the preceding day, the price not to be payable till a year after transfer of the ſtock; and an heritable bond was afterwards granted in conſequence of the transfer, for payment of the agreed price on a day certain: this bond being reduced on the head of uſury, the judgment is reverſed.

Witneſs.—In a reduction on the head of uſury, a menial ſervant of the defender who was a ſubſcribing witneſs to an agreement, being refuſed to be examined, the judgment is reverſed.

The grantee in a bond having propoſed to examine a cautioner therein as a witneſs, with regard to the tranſaction for which the bond was granted, conſenting that what he deponed to ſhould not be of prejudice to him, the Court refuſed to admit him, but the judgment is reverſed.

Appeal.—Interlocutors reverſed, and an agreement adjudged of conſent.

ON Sunday the 27th of March 1720, a verbal agreement was entered into between the appellant and reſpondent, for the purchaſe of 5000*l.* South Sea ſtock; the appellant agreed to ſell at the rate of 410 per cent, which was conſiderably above the market-price of the day before; but the price was not to be payable by the reſpondent for the ſpace of a twelvemonth afterwards. The next day a written agreement was executed by the parties, witneſſed by the writer of it, and John Gourlay one of the appellant's ſervants, which was to this effect, that the appellant ſhould transfer to the reſpondent 5000*l.* South Sea ſtock; the reſpondent delivering to the appellant the bond after-mentioned, at the South Sea Houſe, upon Wedneſday then next; that the reſpondent as principal, and Sir John Anſtruther as cautioner for him, ſhould in conſideration thereof, make and deliver to the appellant an heritable bond for 20,500*l.* ſterling, over their eſtates in Scotland, payable the 28th of March 1721, with intereſt after the day of payment; and each party bound himſelf to perform to the other under the penalty of 5000*l.* ſterling.

In purſuance of this agreement, the appellant transferred the ſtock to the reſpondent on the 30th of March, and the reſpondent delivered to the appellant an heritable bond dated ſame day, whereby the reſpondent and Sir John Anſtruther acknowledge to have borrowed and received from the appellant 20,500*l.* ſterling, which the reſpondent as principal, and Sir John Anſtruther as cautioner bound themſelves conjunctly and ſeverally to re-pay betwixt and the 28th of March 1721, with intereſt from and after the term of payment.

Some ſhort time afterwards the price of South Sea ſtock roſe to an immenſe height. But after the total fall of ſtock, when the term of payment of the ſaid bond was arrived, the appellant was

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ot quit it for 500*l.*

Colonel Middleton, who had entered into a ſimilar tranſaction with Sir John Anſtruther, in which the reſpondent was cautioner, deponed, that Sir John had told the deponent that he thought it wrong and in vain in the reſpondent to diſpute his bargain with the appellant; and that he was reſolved to have no diſputes with the deponent about their bargain; and had ſince paid deponent 900*l.* of the principal ſum.

Some other witneſſes proved that about the time of this tranſaction there were great variations in the price of South Sea ſtock, within the compaſs of a day or two; particularly that between the Saturday and Monday immediately preceding ſtock roſe 95*l.* per cent. The appellant likewiſe produced an account taken from the South Sea books, by which it appeared, that the reſpondent had borrowed of the Company 26,820*l.* upon ſtock and ſubſcriptions.

On the 16th of July 1723 the Court pronounced this interlocutor; "Having conſidered the ſtate of the proceſs, writs pro-
"duced, and the teſtimony of the witneſſes adduced, and debate
"thereon, found that the minute of agreement, and bond
"granted in purſuance thereof, are uſurious, and therefore re-
"duce the ſame." And to this interlocutor the Court adhered on the 30th of ſame month.

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obliged to arreſt the rents of the eſtates of the reſpondent in the hands of his tenants, and bring an action on the ſaid bond before the Court of Seſſion. The reſpondent brought his counter-action againſt the appellant for reducing the ſaid bond upon the head of uſury, libelling upon the act of parliament, 12 Ann c. 16. ſt. 2. and ſtating as the ground of this counter-action, that 410 per cent, which was the rate at which the purchaſe was made, exceeded the common price of ſtock at that time about 90 per cent; and that this advanced price was given for forbearance of payment of the principal money for one year; and that therefore the bond was void. Theſe two actions were conjoined.

12 Ann. c. 16. ſt. 2.

When this action came firſt to be argued before the Lord Ordinary, his lordſhip, on the 21ſt of July 1721, "before anſwer "allowed both parties to prove at what price South Sea ſtock "was bought and ſold on the 28th of March 1720, and what "was the communing and agreement between the parties; and "the reſpondent to prove that the appellant had ſince the date of "the agreement and bond declared that the addition to the cur-"rent price of ſtock upon the 28th of March 1720, was made "for the forbearance, and becauſe the reſpondent wanted ready "money; and the appellant to prove, that the reſpondent diſ-"poſed of what he ſo purchaſed at cent. per cent. profit or to a "great advantage." And to this interlocutor the Court adhered on the 29th of July, and by another interlocutor of ſame date, "Found, that any expreſſion in communings betwixt the re-"ſpondent, or any other acting for him in his name, and the "appellant, in reference to the agreement at the time of the "bargain making, or before or after, might be proved by the re-"ſpondent, by the perſons preſent at thoſe communings; but "that no proof was to be allowed as to any expreſſions at other "times and on other occaſions." On the 28th of November 1721, the Court "adhered to their former interlocutors, with "this addition, viz. that the appellant be allowed to prove, that "at the making the transfer of the ſtock, or at the date of the "bond, he offered the reſpondent 500*l.* or ſome other conſider-"able ſum for his quitting the bargain, and that the ſaid offer "was refuſed by the reſpondents."

A liſt of witneſſes was given into court by both parties, and among thoſe for the appellant were the names of Sir John Anſtruther, and John Gourlay, his (the appellant's) ſervant, who was a ſubſcribing witneſs to the articles of agreement. The reſpondent objected to the admiſſibility of Gourlay, as being the appellant's ſervant, and the Court, on the 13th of February 1722, "ſuſtained this objection againſt Gourlay."

Several witneſſes were examined; among others for the reſpondent, Lord Forreſter depoſed, That he was preſent at the communing relative to the ſale of the 5000*l.* ſtock on Sunday the 27th March 1720; that the appellant demanded 420 per cent. and the legal intereſt, and the reſpondent offered 400*l.*, and by the depondent's advice agreed to give 410*l.*, and that he remembered this agreed price was about 90 per cent. above the current price

price at the time; that it was expreſsly communed between the parties, that the conſideration above the then current price was to be given for the forbearance of payment for a year; and it was reckoned among them how much the premium for forbearance of payment amounted to, but does not remember whether the appellant or reſpondent made the reckoning, but the deponent himſelf made the reckoning in their preſence. That there paſſed ſomething about the extraordinary advantages that might be had for the uſe of money at the time, and that the exchange from Scotland was then very high, and that theſe were made uſe of for inducing the reſpondent to make the bargain; but does not remember that the appellant ſaid theſe things, but that they were ſaid in the communing.

Lord Forreſter, on his croſs examination, deponed, that there was no agreement to give ſo much money as the current price of ſtock, and by a ſeparate bargain to give ſo much more for the delay of payment, but the whole was in one bargain. That the appellant inſiſted for intereſt from the date of the bond, but was afterwards ſatisfied with the 410*l.* per cent. in full.

Patrick Macdowall, who prepared the agreement between the parties, and the ſubſequent heritable bond, deponed, that when the bond was ſigned, the appellant told the reſpondent that he was ſtill ready to depart from the agreement; to which the reſpondent anſwered he would keep his bargain. The appellant told the reſpondent he would give him 20 or 30 guineas, or ſome ſuch ſum to give up the bargain, but the reſpondent anſwered he would not quit it for 500*l.*

Colonel Middleton, who had entered into a ſimilar tranſaction with Sir John Anſtruther, in which the reſpondent was cautioner, deponed, that Sir John had told the deponent that he thought it wrong and in vain in the reſpondent to diſpute his bargain with the appellant; and that he was reſolved to have no diſputes with the deponent about their bargain; and had ſince paid deponent 900*l.* of the principal ſum.

Some other witneſſes proved that about the time of this tranſaction there were great variations in the price of South Sea ſtock, within the compaſs of a day or two; particularly that between the Saturday and Monday immediately preceding ſtock roſe 95*l.* per cent. The appellant likewiſe produced an account taken from the South Sea books, by which it appeared, that the reſpondent had borrowed of the Company 26,820*l.* upon ſtock and ſubſcriptions.

On the 16th of July 1723 the Court pronounced this interlocutor; "Having conſidered the ſtate of the proceſs, writs produced, and the teſtimony of the witneſſes adduced, and debate thereon, found that the minute of agreement, and bond granted in purſuance thereof, are uſurious, and therefore reduce the ſame." And to this interlocutor the Court adhered on the 30th of ſame month.

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The appellant having alſo petitioned the Court, praying again that Sir John Anſtruther might be examined, the Court, on ſaid 30th of July 1723, "refuſed the deſire of his petition."

Entered, 21 Jan. 1723-4.

The appeal was brought from "ſeveral interlocutory orders "and decrees of the Court of Seſſion of the 21ſt and 29th of "July, and 28th of November 1721, the 13th of February 1722, "and 16th of July 1723, and two other interlocutors of the "30th of the ſame month."

Heads of the Appellant's Argument.

As to Sir John Anſtruther and Gourlay the witneſſes refuſed by the Court to be examined, though Sir John might not be produced as a witneſs for the reſpondent, yet he ought to be examined at the inſtance of the appellant, who conſented that whatever he deponed ſhould not be made uſe of againſt himſelf. And though Gourlay was the appellant's ſervant, yet being a ſubſcribing witneſs to the bond, the appellant had a right to his teſtimony.

In this caſe there was no loan of money or any thing elſe, but an abſolute ſale and transfer of ſtock, in the nature of a time bargain for which a certain groſs ſum was to be paid at the diſtance of a year, without any intereſt. Lord Forreſter indeed ſays that he remembers the agreed price was about 90*l.* per cent. above the *current* price at the time, and that it was expreſsly communed between the parties, that the conſideration above the then current price was agreed to be given for the forbearance of the payment of the price for one year: now it is moſt certain that there was no *current* price at the *time*, for the time was upon a Sunday, and therefore his lordſhip was at liberty to reckon it at what rate he pleaſed. But he could not be ſure, that his notion of the price of ſtock was within 90*l.* per cent. of other people's notions of it, and the only mode he could have of reckoning the price of ſtock at the time was notional and imaginary; and it might as well have differed 95*l.* per cent between the Saturday night and Monday morning when the agreement was put in writing, as it did between the Saturday and Monday before. But it manifeſtly appears that a premium for forbearance of the payment of the price was not reckoned by any body but Lord Forreſter; for he ſwears there was but one bargain, and one agreement for the price, and ſince no more is given but *that agreed price*, it is not eaſy to conceive how it could be agreed to give any conſideration for forbearance of the payment of that price: there muſt either have been two ſeparate bargains, firſt to give a price and then ſo much for forbearance of payment of that price, which his lordſhip denies, or there could be nothing given for forbearance of payment. The appellant alſo proved, that Lord Forreſter had made contracts to accept of 10,300*l.* South Sea ſtock at 56,950*l.* But though his lordſhip's evidence had been full in point, yet by the law of Scotland one witneſs is not ſufficient.

Sir

Sir John Anſtruther has paid part of the money, and makes no ſcruple of paying the reſt upon his bond, wherein the reſpondent is bound as his ſecurity to Colonel Middleton, which was given upon a bargain made by the appellant with Sir John for 1000*l.* South Sea ſtock, upon the very ſame terms as this agreement was made with the reſpondent.

Heads of the Reſpondent's Argument.

With regard to Sir John Anſtruther, the application to have him examined was made not only after iſſue joined, but after the proof was concluded, and both parties circumduced from bringing further proof. Beſides Sir John was ſurety in the bond, and a party in the ſuit, and ſo was not a proper evidence in this caſe, unleſs the appellant would have put the whole iſſue upon his oath, according to the law of Scotland, which the appellant refuſed to do. With regard to Gourlay; by the law of Scotland no menial ſervant can be examined for his maſter, being ſuppoſed to be under influence, and the appellant opened nothing material, that he intended his ſervant ſhould be examined to.

This was not a naked ſale of ſtock, but at worſt a loan intermixed with and adjected to a ſale, the ſtock was transferred, the value of it lent, or which is the ſame thing, a forbearance of payment of it given for a year, and a high intereſt exacted on that account. The circumſtances of the caſe make it plain, that the loan or credit given for the money, was the principal if not the only thing that brought the reſpondent into the bargain with the appellant; for if a ſale and purchaſe only had been intended, the reſpondent muſt have purchaſed from another at the difference of 90*l.* per cent cheaper.

The appellant contended that the money given above the current price, was given for the hopes of gain by the riſe of ſtock; but this is impoſſible, for if the reſpondent had purchaſed from any other perſon at the current price, he would have had better proſpect of gain by the riſe of ſtock. It is plainly proved that the forbearance of payment for one year, was communed upon as the conſideration for which the advanced ſum above the current price was given, and that it was calculated how much it came to in the way of intereſt.

It is proved that ſtock had a certain current value on the day the bargain was concluded, viz. from 316*l.* to 320*l.* per cent. And it is proved, that the bargain proceeded upon the footing and ſuppoſition, that that was the current price of ſtock; and conſequently the advanced ſum covenanted to be paid, was according to the intention of parties at the time for ſome other cauſe than the value of ſtock, which could only be the forbearance.

There is no reſemblance between a time bargain and the contract in queſtion. In a time bargain, nothing is transferred to the buyer, nothing is lent to him, no uſe of money nor value of merchandize is given him, there is no forbearance of payment; and therefore uſury cannot take place in ſuch a bargain. The chance

is equal both on the ſide of the buyer and ſeller. In a time bargain, the value of ſtock is not to be computed as at the time of the contract, but at the time of implementing it; for till then, there is neither ſale nor loan, but a perſonal obligation on the one ſide to deliver, and on the other to receive and pay: it may happen, that the ſeller has no ſtock on the day of the bargain, and is forced to buy it at a high price on the day of the delivery.

Judgment, 23 March 1723 4.

After hearing counſel, the counſel for the appellant having informed the Houſe, "that the appellant had that regard to the "reſpondent and the loſs ſuſtained by him in the ſtocks, that he "would conſent that the bond and infeftment in queſtion, "though found good by the Houſe ſhould be reſtricted to the "ſum of 11,000*l.* payable at Martinmas next, with intereſt "from this day, and to the further ſum of 2000*l.* by way of "penalty over and above the ſaid 11,000*l.* and intereſt from this "day, in caſe the ſaid 11,000*l.* and intereſt be not paid at the "day aforementioned," and the appellant being preſent in perſon declared his conſent thereto to the Houſe; *It is ordered and adjudged that the ſeveral interlocutory orders and decrees complained of in the ſaid appeal be reverſed; and in regard of the appellant's conſent above-mentioned, it is further ordered, that all further proceedings be ſtayed upon the ſaid bond and infeftment till Martinmas next; and in caſe the ſum of* 11,000l. *ſterling with intereſt from this day be then paid to the appellant, or his order, that from thenceforth the ſaid bond and infeftment ſhall be eſteemed to be fully ſatisfied and diſcharged, and ſhall be delivered up and vacated in due form of law; and in default of payment of the ſaid* 11,000l. *with intereſt from this day, at the time aforeſaid, the ſaid bond and infeftment ſhall be reſtricted to the ſaid ſum of* 11,000l. *and intereſt, and the further ſum of* 2000l. *in name of penalty; and the appellant ſhall be at liberty thenceforth to purſue and carry on his ſuit upon the ſaid bond and infeftment, under the reſtrictions aforeſaid, in the ſame manner as if no ſtay of proceedings had been ordered, and upon his recovering and being paid the ſaid ſum of* 11,000l. *and intereſt from this day; and the ſaid penalty of* 2000l., *the ſaid bond and infeftment ſhall thenceforth be eſteemed fully ſatisfied and diſcharged, and ſhall be delivered up or vacated in due form of law.*

For Appellant, *Dun. Forbes. C. Talbot. Will. Hamilton.*
For Reſpondent, *Ro. Dundas. C. Wearg.*

This deciſion is in ſome degree intereſting, as relating to the appellant, the famous Colonel Charteris. His conduct at the hearing of the appeal is certainly not of a piece with many things alleged againſt him on all quarters; he there gave up to the reſpondent a very large ſum of money, which would have been his, if the interlocutors had been ſimply reverſed, which they would probably have been.

The witneſs Gourlay was alſo famous in his day.

George Munro, of Culcairn, and Captain Donald Macneil - - - - - - - - *Appellants*; Caſe 108.

Kenneth Mackenzie, of Auchtiedonald, and Others - - - - - - - - - - - *Reſpondents.*

31ſt *March* 1724.

Coſts and Expences.—One of the defenders in a ſpuilzie, who was an officer in the king's ſervice during the rebellion, being aſſoilzied, petitions for his expences, which are refuſed by the Court, but the judgment is reverſed upon appeal, and the Court is ordered to tax and aſcertain his coſts.

Witneſs.—In a ſpuilzie brought againſt the leader of a party, on the king's ſide during the rebellion, perſons belonging to that party were valid witneſſes for the defender.

Spuilzie.—The Court having found the leader of ſaid party liable in damages, without hearing him upon the relevancy; their judgment is reverſed, and they are ordered to hear the defender on the relevancy.

THE appellant, Munro, being a deputy lieutenant in ſeveral counties, and ſheriff depute of Roſsſhire, was very active on the ſide of government at the time of the rebellion: The appellant, Macneil, was a captain in the well affected militia. On the 20th of April, 1716, the Earl of Cadogan, then commander in chief in Scotland, did, by his order, direct the appellant, George Munro, to uſe his utmoſt endeavours to ſeize and apprehend forthwith all gentlemen and heritors in the country, belonging to the Earl of Seaforth, and in the ſhires of Roſs and Cromarty, who had been in the rebellion, and ſend them priſoners to Inverneſs; and the commanding officer of that garriſon was by the ſame order directed to give him ſuch detachments of the troops as he ſhould judge neceſſary. By another order of the 23d of ſame month, the ſaid Earl directed both the appellants to uſe their utmoſt endeavours to diſcover and apprehend all ſuch perſons as had been in the rebellion, and to ſend them priſoners to ſuch of His Majeſty's garriſons as ſhould be neareſt the place where they might happen to be taken up. In conſequence of theſe orders, the appellants proceeded to the Earl of Seaforth's country, and took ſeveral ſteps againſt perſons who were in arms. The reſpondent, Mackenzie, and his father, now deceaſed, being abſent from their houſes, the appellants reſided in them for ſome days; and the conduct of them, and the party under their command, during theſe days, became the ſubject of the following action.

The reſpondent's father, in October 1721, brought an action of ſpuilzie before the Court of Seſſion, in his own name, and in the names of his ſon and of their tenants, againſt the appellants. This action ſtated that the appellants did, in a violent manner, take poſſeſſion of the reſpondent's father's houſe, and after having lived there with their whole party for ſeveral days, without paying for any thing, did, when they went away, plunder the ſaid

which were refuſed upon the 13th and 19th of February, 1723.

The appellant Macneil preſented a petition to the Court, ſetting forth that he had been put to conſiderable expences by the ſaid action of ſpuilzie, from which he had been aſſoilzied, and he gave in an account of 264*l.* 18*s.* 4*d.* Scots, of expences which he claimed, together with a further ſum of 60*l.* Scots, for extracting the decree; but on the 28th of February, 1723, the Court "refuſed the deſire of the petition."

Entered, 25 Jan. 1723-4.

The appellant, Munro, brought his appeal from "ſeveral interlocutors of the Lords of Seſſion of the 14th and 15th of "November, 1722, and that part of the interlocutor of the 4th "of December following, affirming their former interlocutors, "and the interlocutors of the 26th of the ſaid month of Decem- "ber, the 5th, 15th, 18th, and 23d of January, 1723, and "the 13th and 19th days of February following."

And the appellant, Macneil, brought his appeal from "the "interlocutor of the 28th of February, 1723, refuſing him "his coſts."

The purſuer, in the original action having died, the appeal was transferred againſt the reſpondent, Mackenzie, his ſon.

Argument of the Appellant Munro.

This appellant was acting for His Majeſty's ſervice, in purſuance of an order from the general for that purpoſe; and if any of the perſons then under his command committed diſorders, or took away ſome things unknown to him, it were very hard to make that a charge againſt him. When he came there with a lawful command for the ſervice of government, no evil ought to be imputed to him, except what was done with his own hand, or by his ſpecial order; but nothing of that was pretended, nor did any of the things, or of their value, come to his poſſeſſion.

The Court proceeded to take the proof brought by the purſuer under conſideration, and to give judgment upon it, before they heard the evidence brought by the appellants, though by their interlocutor of the 16th of June, they allowed that evidence to be brought. And when it appeared by the evidence of Robert Gordon, that all the goods that were in the hands of the militia were reſtored, whereby a further proof of the particular quantities became neceſſary, the Court was pleaſed to diſallow the appellant to bring any further proof.

The appellant conceives it was no good objection againſt Mr. Munro, of Altas, being a witneſs, that he was one of the party under the appellant's command. On the contrary, thoſe of that party were the moſt proper witneſſes to prove facts that they ſaw, and in the event of which they could neither gain nor loſe. And ſince the Court were of opinion, that thoſe of the appellant's party were not proper witneſſes, they ought to have allowed him

him to examine other witneſſes as to the reſtitution; and had that liberty been indulged to the appellant, he could have proved that every individual thing was reſtored; ſo that he is decreed to pay for what the reſpondents have in their own poſſeſſion.

If the appellant muſt be accountable, the value of the goods ought to be aſcertained by witneſſes; but he is decreed to pay the ſum of 767*l.* 6*s.* 8*d.* Scots for goods, of which there is no other proof of the value, than the ſtatement in the purſuer's condeſcendance.

Argument of the Appellant Macneil.

This appellant ought to have been allowed his expences, ſince nothing is proved againſt him. He conceives, that no countenance ought to be given to the bringing vexatious ſuits againſt thoſe who were at that time employed in his majeſty's ſervice; and he may be allowed to call this a vexatious ſuit as to him. The caſe of both the appellants is the more favourable, that the matters complained of were in June 1716, before the rebellion was at an end in Scotland, and the legiſlature thought fit ſo far to interpoſe, as to indemnify all perſons who acted in the defence of his majeſty's perſon and government in the year 1715, from vexatious ſuits and proſecutions.

Argument of the Reſpondents.

Any commander of a regular party is anſwerable for all the outrages committed by the party, unleſs he proves that he could not prevent the ſame. And he who has the legal command of a party, and allows them to commit outrages, is much more guilty than he who has no legal command; becauſe he not only does the ſame injuſtice to the private perſons injured by his party, but likewiſe commits a great crime againſt the government, in abuſing the power and truſt committed to him. But it is remarkable in this caſe, that the witneſſes depone expreſsly, that the appellant and his party committed all theſe outrages and depredations, and that they heard him give orders for burning the houſes, and ſaw him receive money for reſtoring ſome of the goods to the owners.

It is not the method of proceeding before the Court of Seſſion, nor as the reſpondents conceive before any other courts, to give liberty and further time for examining witneſſes, after the proof is concluded, and circumduction paſt, without ſome extraordinary reaſon for ſo doing. The appellant Munro obtained a ſecond order for examining witneſſes, of conſent of the then purſuer, who was moſt willing to allow deduction of whatever was reſtored. But he would not conſent to a third order, which was deſired by the appellant only for delaying the cauſe; and the Court of Seſſion moſt reaſonably refuſed it, becauſe the appellant could give no reaſon for ſuch demand, but only that he had brought up witneſſes, againſt whom the Court had found, that there was an evident objection in law.

With regard to the appellant Macneil, he was upon the ſame command with the other appellant, Munro, and not far diſtant, with a party of regular troops, and the reſpondents conceive that it was therefore proper to make him a party to the action, for it was not known, but that Macneil had the chief command of both parties. And by the cuſtom and practice of Scotland, no perſon, who has a *probabilis cauſa litigandi* is ever decreed to pay coſts.

Beſides, Captain Macneil did not apply for coſts, till after the decree was given out, and the ſuit fully terminated; and by the conſtant forms of the Court of Seſſion, no coſts are given if not moved for before giving out the decree. The reſpondents were not ſerved with Macneil's petition for coſts, and the principal cauſe being fully terminated below, they were not bound to appear further in court. The Court therefore refuſed the deſire of Macneil's petition, without ordering the reſpondents to put in anſwers to it.

Judgment, 31 Mar. 1724.

After hearing counſel, *It is ordered and adjudged, That the interlocutor of the 28th of February*, 1722-3, *whereby the Lords of Seſſion refuſed the appellant, Macneil, his coſts, be reverſed, and that the ſaid Lords of Seſſion do cauſe his coſts to be taxed and aſcertained, and when ſo aſcertained, to be forthwith paid to him by the reſpondents; and it is further ordered and adjudged, That the interlocutor of the 19th of February*, 1722-3, *be reverſed; and it is hereby declared, that it is the opinion of this Houſe, "that William Munro, "and other perſons of the party commanded by the appellant George "Munro, may be proper witneſſes for the ſaid appellant, in this cauſe, "notwithſtanding their being of the ſame party, unleſs there be ſome "other juſt cauſe of objection againſt that teſtimony; and that the ſaid "appellant be at liberty to produce witneſſes in his defence; and that the "witneſſes already examined on behalf of the plaintiff below, be re-"examined; and that the defendant below be at liberty to croſs examine "them; and that the appellant, Munro, be heard in the Court below "as to the relevancy of the libel."*

For Appellant, *P. Yorke. Dun. Forbes. Will. Hamilton.*
For Reſpondents, *Ro. Dundas. C. Talbot.*

ne Eſther Gray, Widow and Executrix f Sir James Gray, Bart. her late Huſand, deceaſed, - - - - - - - - - *Appellant;*

rard Callander, Writer in Edinburgh, - *Reſpondent.*

Caſe 109. Kaims, Jan. 1723.

1ſt April 1724.

Aſſignation General.—An aſſignation to a creditor of as much of the firſt and readieſt of the rents of his lands that ſhould happen to be due to him at the time of his deceaſe, as would ſatisfy and pay a certain ſum, gave no preference in a competition of creditors after the debtor's death.

Creditors of a defunct.—*Act of Sederunt*, 1662.—After expiration of ſix months from the debtor's death, one creditor cites the executor in an action of conſtitution on the 18th of June, and ſame day the executor cites that creditor, and the general aſſignee above-mentioned, in a multiple poinding: the latter afterwards, on the 27th of June, cited the executor in an action of conſtitution; the creditor, giving the firſt citation, alſo got the firſt decree of conſtitution, and is by the Court preferred to the other; but the judgment is reverſed, and both are preferred *pari paſſu*.

FTER the determination of the appeal, No. 1, of this collection, by which the Duke of Hamilton was ordered to to Sir James Gray, Bart. the ſum of 1900*l.* with intereſt :of, upon an agreement of the parties, Sir James advanced uch money as, with the principal and intereſt then in arrear 1 the ſaid bond, made up 1400*l.* And for ſecuring the renent thereof, the Duke, on the 25th of March, 1709, exed a bond to Sir James in the ſum of 1400*l.* of principal, pay- with intereſt on the 15th of May, 1710; and in that bond luke aſſigned to Sir James as much of the beſt and readieſt of ents of the Dukedom of Hamilton, whenever he ſhould hapto ſucceed thereto, as would ſatisfy the ſaid 1400*l.* and in-t. Of the ſame date, the duke executed another deed, by :h he aſſigned to Sir James as much of the firſt, readieſt, and of the rents, or arrears of rents of his lands in Scotland, ſhould be due to him at the time of his deceaſe, and as h of the firſt and readieſt of all his moveable goods, debts, ſums of money, and others whatſoever, that ſhould happen ertain and belong to him at the time of his deceaſe, in caſe nother ſhould ſurvive him, as ſhould be ſufficient to pay the bond.

he duke, in his lifetime paid ſeveral ſums of money to act of the intereſt of the ſaid ſum of 1400*l.* but died in Nober, 1712, in the lifetime of his mother, and no part of the cipal money was paid. The Court of Seſſion, in March eafter, appointed one Crawford, factor, to receive the arrears ents due to the duke at the time of his death; and to this or Sir James intimated, in due form, the aſſignments of the ars of rents made by the duke in his favour.

The late Duke of Hamilton was alſo indebted to the reſpondent in the ſum of 900*l.* ſterling with ſeveral years intereſt upon a bond dated 22d November 1703; and upon this bond the reſpondent had raiſed and executed letters of horning againſt the duke in 1706.

The preſent Duke of Hamilton was confirmed executor to his father deceaſed on the 16th of June 1722, and immediately gave up an inventory of all his father's perſonal eſtate, and particularly of the arrears of the rent that were due at the late duke's death, and which had been received by the factor, or continued in the hands of the tenants. His grace alſo raiſed an action of multiple poinding before the Court of Seſſion, in which he called all his late father's creditors as parties.

In this action of multiple poinding both the appellant and reſpondent received citations on the 18th of June 1722; and on the ſame day the reſpondent cited the duke as executor in an action of conſtitution of his debt before the commiſſaries of Edinburgh. On the 4th of July the commiſſaries ſuſtained proceſs at the reſpondent's inſtance; on the 17th of July, they found the debt proved, and decerned againſt the executor; but the final decree of conſtitution, was not given out till the 21ſt of that month. Upon this decree, the reſpondent took out letters of horning and charged the executor; but further proceeding was ſtopped by the multiple poinding.

The appellant's huſband on the 27th of June 1722, alſo cited the duke before the commiſſaries, and applied by petition to be conjoined in the reſpondent's action, but this was refuſed. Sir James Gray, on the 17th of July, obtained an interlocutor for ſuſtaining proceſs againſt the executor; but did not follow out a decree for payment of the debt.

The action of multiple poinding coming to be heard before the Lord Ordinary, Sir James Gray, inſiſted that by virtue of the aſſignation by the late Duke of Hamilton in his favour, of all the perſonal eſtate, he ſhould die poſſeſſed of, and particularly of all the rents of his eſtates that ſhould be due at the time of his death, Sir James, ought as to the perſonal eſtate to be preferred to all other creditors merely perſonal. The reſpondent on the other hand founded on his prior citation before the commiſſaries. The Lord Ordinary having reported this cauſe, the Court on the 18th of January 1723, "preferred the reſpondent." Sir James Gray reclaimed, and the Court, after anſwers for the reſpondent, on the 8th of Februray 1723, "found that Mr. Callander had no right "to the heirſhip moveables by virtue of his decree before the "commiſſaries; and found that the petitioner Sir James Gray "could have no preference upon his aſſignation, but remitted to "the Lord Ordinary to hear parties, how far the petitioner and "Mr. Callander upon their reſpective diligences were preferable "*pari paſſu* or not."

Sir James Gray in the mean time died, having left the appellant his executrix, and the cauſe being transferred againſt her, upon report of the Lord Ordinary, a hearing was ordered by the Court upon

upon the point of preference with reſpect to the diligence: and after a debate thereon, the Court on the 15th of November 1723, "adhered to their former interlocutor, preferring the reſpon-"dent."

The appeal was brought from "ſeveral interlocutory ſentences "of the Lords of Seſſion of the 18th of January, the 8th of "February, and 15th of November 1723." Entered, 21 Jan. 1723-4.

Heads of the Appellant's Argument.

As Sir James Gray had a judgment againſt the duke, ſo long ago as 1708, and might have then ſued it to execution, and recovered his payment: ſo out of friendſhip to his grace, he took the ſecurity in queſtion, in order to ſecure his payment in all events; and the duke having executed the ſaid aſſignment for a conſideration ſo beneficial, Sir James ought to have the benefit thereof, and be preferred to any creditor who had no ſuch ſecurity.

Sir James by this general aſſignment had a hypotheck upon or conventional pledge of all the aſſignor's perſonal eſtate, for payment of his debt; and conſequently the preſent duke who was confirmed executor, ought to be conſidered as a truſtee for the aſſignee, ſo far as his debt extends; and his poſſeſſion of the perſonal eſtate ought to be for the benefit of the aſſignee, and the executor being in the eye of the law the ſame perſon as the deceaſed, it is not neceſſary to give notice to him. Nor does it alter the caſe, that the aſſignor continued in poſſeſſion, becauſe the aſſignment was of ſuch things as could not admit of a preſent poſſeſſion, viz. the perſonal eſtate, the duke ſhould die poſſeſſed of. And Sir James having given notice of his aſſignment to the factor appointed by the Court of Seſſion to receive part of the very ſubject of the aſſignment, Sir James ought to be preferred to any other creditor as to theſe arrears, the factor being the only perſon to whom ſuch notice could properly be given.

A debt thus fairly contracted, and ſecured by ſuch an aſſignment, if it ſhould not give a preferable right to the aſſignee, ought at leaſt to entitle him to come in equally with any other creditor, and be paid in a due proportion, as far as the aſſets will go.

It is true that in order to prevent one creditor, who might be in a good correſpondence with an executor, from carrying off all the effects to the hurt and excluſion of the others, an act of ſederunt in 1662, was made by the Lords of Seſſion, declaring "that all "creditors of defunct perſons uſing legal diligence at any time "within half a year of the defunct's death, by citation of the "executors and intrometters with the defunct's goods, &c., ſhall "come in *pari paſſu* with any other creditors, who have uſed more "timely diligence." But there is no law or ſtatute which enacts, that after the expiration of the ſix months, a creditor giving a citation one day, or one hour before another creditor ſhall be paid in the firſt place. The appellant conceives, that all creditors having an equal right by the nature of their debts, who appear before aſſets are actually applied, ought to be paid equally; the Act of Sederunt. 28 Feb. 1662.

caſe would otherwiſe be extremely hard. The reaſon of this regulation relative to creditors doing diligence within ſix months of the debtor's death, favours the appellant; for if all creditors, who commenced their actions within ſix months of the debtor's death, ought to be paid equally in order to prevent ſurprize, for the ſame reaſon ought creditors, who ſue within ſix months after confirmation, to be equally paid; the executor being the only proper perſon to be ſued.

Sir James in this caſe, not only cited the executor a few days after his confirmation, but had prayed to be admitted to plead preference in the reſpondent's ſuit, and had even obtained ſentence againſt the executor, as ſoon as the reſpondent, and all this before any payment made by the executor, for to this hour he is poſſeſſed of the whole effects, and has not paid any part to the reſpondent.

The citation in the multiple poinding was given to Sir James, and to the reſpondent on the ſame day, that the reſpondent cited the duke before the commiſſaries: and this citation by the executor to both creditors, ought to be conſidered as equivalent to, and the ſame as if Sir James had then cited the executor, ſince it put a ſtop to any effectual proceedings before the Commiſſary Court, and brought the matter to be properly determined in the Court of Seſſion; and Sir James in that Court could have recovered a decree, juſt as if he had cited the executor.

Heads of the Reſpondent's Argument.

The law of Scotland, for the benefit of commerce, has long ſince repudiated all private ſales, or impignorations of goods or effects, unleſs the goods and effects ſo ſold, or pledged be actually delivered to the buyer or creditor, or to ſome third perſon in truſt for him. It is certain that the late Duke of Hamilton might, during his life, ſell or diſpoſe of any part of his perſonal eſtate, and that the ſame was ſubject to be taken in execution by any creditor, notwithſtanding of this aſſignment to Sir James Gray, which after the late duke's death, ought no more to protect his perſonal eſtate, than it did or could do in his lifetime.

By the law and cuſtom of Scotland, creditors were preferred according to their diligence, the creditor who gave the firſt citation being preferred to all the reſt. But in the year 1662, the Lords of Seſſion, conſidering that creditors, living at a diſtance, were often without any fault or delay of theirs excluded by the prior diligence of creditors, who lived near to the deceaſed, and thereby got quicker intelligence of his death, did therefore make an act of a ſederunt ſettling a rule, that all creditors giving citations within ſix months of the death of the debtor, ſhould be preferred *pari paſſu*. But if the creditor did not come forward in that time, the Lords of Seſſion thought he deſerved no relief; and therefore after the expiration of that time, the old law ſtill takes place, and creditors are preferred according to the priority of their citations; and *vigilantibus jura ſubveniunt*. Were it otherwiſe the executor might prefer whom he pleaſed by inſiſting on dilatory ple-

Stair B. 3. Tit. 8. § 68, 69.

pleas againſt one creditor, in order to *retard* his obtaining a decree, and allowing another creditor to get a decree without diſpute.

The commiſſaries could not by the forms of their Court, admit the appellant into the reſpondent's action before them; every perſon who has a juſt claim, and brings his action, gets a ſeparate decree againſt the executor; but though the commiſſaries had granted this requeſt, it could have been of no ſervice, the preference depending upon the date of the citation.

The appellant ſtated, that Sir James obtained a decree of the commiſſaries on the ſame day that the reſpondent obtained his: but the interlocutor which the appellant points at, is that of the 17th of July, ſuſtaining proceſs at her huſband's inſtance; and the reſpondent had obtained an interlocutor of the ſame nature with that upon the 4th of July, and upon the 17th, he obtained a further judgment, finding the libel proved, and decerning to pay, which is what neither Sir James, nor the appellant ever obtained; ſo that in effect, the appellant has no decree of the proper court in her favour. Nor could the Lords of Seſſion upon the multiple poinding have given her ſuch a decree; for in that action they can prefer no creditor, unleſs ſuch creditor have a decree conſtituting his debt againſt the executor, or an action pending before the Court of Seſſion for that end, neither of which the appellant ever had: whereas the reſpondent has a final decree of the Commiſſary Court of the 21ſt of July 1722, conſtituting his debt againſt the executor; and ſo has not only the firſt citation, but alſo the firſt and only decree.

After hearing counſel, *It is ordered and adjudged that the interlocutor complained of in the ſaid appeal of the* 15th *of November* 1723, *adhering to the interlocutor of the* 18th *of January* 1723, *be reverſed: And it is hereby declared, that it is the opinion of this Houſe,* "*that the appellant in virtue of her diligence is entitled to a proportionable ſhare, with the reſpondent of the perſonal eſtate, and executry of James late Duke of Hamilton, and that the appellant and reſpondent are preferable, and be paid pari paſſu accordingly.*

Judgment, 2 April 1724.

For Appellant, *Ro. Dundas. C. Wearg. Will. Hamilton.*
For Reſpondent, *Dun. Forbes. C. Talbot.*

In the Dictionary vol. I. p. 207. *Creditors of a Defunct*, the judgment of the Court of Seſſion, though here reverſed, is mentioned as an exiſting deciſion: the ſtatement appears alſo to be erroneous in mentioning the caſe, as if the creditor who gave the laſt citation obtained the firſt decree. It is alſo ſtated by Mr. Erſkine, Inſtit. B. 3. tit. 9. § 46.

Case 110. Margaret, Agnes, Mary, Marion, and Janet Kennedies, Heirs Portioners of the deceaſed Alexander Kennedy, of Glenour, their Brother, and their reſpective Huſbands for their Intereſts, - - - *Appellants;*

Alexander Macdowall, of Garthland, - *Reſpondent.*

13th April 1724.

Writ.—A bond reduced as vitiated, where after the ſum the word "Pounds" was written upon an erazure, and the penalty was in merks, *effairing* to a fifth part of the principal if it had been merks, but not if pounds, as it ſtood on the bond as claimed on. This bond had been allowed, as it then ſtood, for a compenſation in an action, between the father of the perſons founding on it, and a third party, upwards of thirty years before, but was not then produced.

Coſts and Expences.—An affirmance, with 20l. coſts to the reſpondent.

THE late John Kennedy of Glenour deceaſed, the father of the appellants, being indebted to one Robert Linn in the ſum of 2500 merks, on the 24th of April 1672, granted a bond for that ſum, blank in the creditor's name, as was then cuſtomary in Scotland. And in 1682, the father of the appellants became further indebted to this Linn, in the ſum of 1420 merks, for which he granted three ſeveral bonds to Linn.

It appears, too, that on the 20th of Auguſt 1674, Linn had executed a bond in favour of the appellant's father: whether or not this was an exiſting bond, and whether or not it had been vitiated in the ſum, is the ſubject of the preſent appeal.

Robert Linn died in 1683, leaving three children under age, and the reſpondent's father, one of their tutors and curators. In 1684, the children were confirmed executors to their father, and gave in an inventory bearing to be of the whole effects, and debts belonging to him, and alſo of the debts owing by him; and in this inventory no mention is made of the bond granted by Linn, to the appellant's father in Auguſt 1674: in this confirmation, the appellant's father became cautioner for the executors.

In a ſhort time after Linn's death, one Captain Mac Culloch, a creditor of the deceaſed, in the ſum of 7000 merks, arreſted in the hands of the appellant's father, and of another perſon indebted to Linn, all ſums owing by them; and afterwards brought an action of forthcoming againſt them in the Court of Seſſion; in which (the appellants mention) Linn's children were called as parties; but (the reſpondent ſtates,) the minors did not appear. In that action the appellants father appeared by his counſel, and gave in a declaration ſigned by him, bearing that he was debtor to the deceaſed Robert Linn, in the four bonds above mentioned, except in ſo far as the ſaid Robert Linn was debtor to him, by the ſaid bond of the 20th of Auguſt 1674, which he ſtated to be for 1730*l.* Scots, with intereſt from the date:

date: this bond itſelf was not then produced, but Captain Mac Culloch in February 1685, took a decree againſt the appellants father for the balance, being 2041 merks, of the ſaid four bonds, after deduction of the bond of Auguſt 1674.

After this period the ſaid bond for 2500 merks was ſued to execution by the children of Robert Linn, and their curator; and the appellants' father was thrown into gaol, where he continued a conſiderable time, and at laſt, with the aſſiſtance of a mob, broke priſon about the year 1690: but no ſatisfaction of the debt was obtained.

The reſpondent in 1721, obtained the ſaid four bonds, granted by the appellants' father to be conveyed to him, and brought an action thereupon in 1721, againſt the appellants as heirs or executors of their father before the Court of Seſſion. In this action the appellants appeared and made defences, that theſe bonds were extinguiſhed by compenſation and payment of the balance to Mac Culloch in 1685; and for proof of this, they referred to the decree of forthcoming, and to the bond granted by Robert Linn to the father of the appellants. The reſpondent having got this original bond produced in Court, from the record in which it had been regiſtered; inſiſted that the bond had not been produced in the former action, and that neither he, nor the perſons who had aſſigned to him had appeared in that action, and that he could, therefore, ſtill object to that bond's being allowed as a ground of compenſation, to extinguiſh any of the bonds upon which he ſued: he further objected, that the bond was preſcribed, not having been ſued for within 40 years; and likewiſe that it appeared to have been vitiated, the word *pounds* being ſuperinduced, or put in place of the word *merks*, and that therefore the bond was entirely *void*.

The Court on the 19th of July 1723, after defences for the appellants "repelled the preſcription and ſuſtained the compenſation, and alſo repelled the objection proponed againſt the bond."

The reſpondent reclaimed, ſetting forth that he had clearly diſcovered by the help of glaſſes, that the bond had originally been for the ſum of 1730 merks, and that the word *pounds* had been put in place of the word *merks*, with a different hand and different ink, and that the penalty ſtill remained only 300 merks, which was a proportionable penalty to 1730 *merks*; and, that the preſumption was, that the amendment, or vitiation was done after executing, unleſs the reſpondents could prove that it was ſo done before delivery and by conſent of parties. After anſwers for the appellants, the Court on the 26th of November 1723, "found the bond vitiated and therefore declared it null."

The appellants having reclaimed, the Court on the 20th of December 1723, after anſwers for the reſpondent, "refuſed the deſire of the petition, and adhered to their former interlocutor annulling the bond.

The

Entered 27 Jan. 1723-4.

The appeal was brought from "two interlocutors of the Lords "of Seſſion, of the 26th of November, and 20th of Decem- "ber 1723."

Heads of the Appellants' Argument.

The compenſation upon this bond for 1730l. was allowed by the Lords of Seſſion in 1685, in the action of forthcoming at the ſuit of John Mac Culloch; and the perſons who had then right to theſe bonds, were parties to that action, and ought to be concluded by the decrees and orders then made, and not left at liberty to diſpute the juſtice of them, eſpecially after ſuch a diſtance of time.

As to the objection now offered, that the bond is vitiated, if any alteration appears to have been made, it was certainly made before delivery, and by conſent of parties; and for this the preſumptions are very ſtrong.

The reſpondent's father, who was tutor to Linn's children, made no objection againſt this bond in the action at the inſtance of John Mac Culloch, though he certainly knew that this bond was then ſet up by the appellants' father as a good bond for the ſum of 1730l. and was by the Court of Seſſion allowed of in diſcharge of ſo much of the debt due by the appellant's father to this Linn; and Patrick Linn the writer of, and a ſubſcribing witneſs to this bond was then alive.

The reſpondent's father was ſo conſcious, that this was a good bond for the ſaid ſum of 1730l., that he never pretended to ſue upon either of the ſaid three bonds granted by the appellants' father to Robert Linn: and when he ſued upon the ſaid blank bond for 2500 merks, he filled up his own name in the bond, thereby to prevent the appellants' father's plea of compenſation.

Neither the reſpondent nor his father ever ſued upon any of the bonds in queſtion, ſo long as any perſon was alive, who could prove or direct how to prove, that there was any alteration made in this bond at the time of the delivery; ſo that it is probable that the reſpondent and his father knew of the objection made againſt this bond, and purpoſely delayed bringing their action till it were impoſſible for the appellants to find any proof of the tranſaction at the time the bond was executed.

Neither the reſpondent nor his father ever demanded ſo much as any part of the intereſt due upon all or any of theſe bonds, now ſued on, though one of them is granted 50, and the reſt 40 years ago; and if the profits of compound intereſt be conſidered, it is not probable that either the reſpondent or his father, would have willingly ſuſtained ſuch a loſs.

It is no argument againſt the bond, that the penalty ſtill remains the ſum of 300 merks. Penalties do not always bear a certain proportion to the principal ſum; and the appellants humbly think this to be a very ſtrong argument againſt any fraudulent alteration of the bond; for if any ſuch fraudulent alteration had

had been made, the perſon committing ſuch fraud would certainly have turned merks into pounds in that place, as well as in the other parts of the bond.

The reſpondent himſelf acknowledges, that this bond was originally for 1730 merks; therefore, granting that theſe *merks* had been fraudulently altered and made *pounds* by the appellant's father, the declaring it entirely void, is puniſhing the appellants moſt ſeverely for a fault they were not privy to, and the puniſhment is the more grievous to them, in reſpect they are thereby ſtript of their all.

Heads of the Reſpondent's Argument.

The bond in queſtion can be the foundation of no claim or ſuit; in the form it now appears it certainly was not the deed of Robert Linn: the writing bears Robert Linn to have borrowed and receved from the ſaid John Kennedy the ſum of 1730 merks, and then there is a hole in the paper ſeeming to be purpoſely worn out, and the letter "d" is written with freſh ink upon the ſide of the tearing to make it be believed that the word "pounds" had been there written.—And in the clauſe obliging to repay the money are theſe words "which ſum of one thouſand ſeven hundred and "thirty," and then there is a blank not ſufficient to have contained the word "pounds," and therefore thoſe who made the vitiation, and inſerted the word pounds have been obliged to run one half of the word above the line, ſo as to make an interlineation, and the ſtraight part of the line below "pounds" ſtill remains blank.—And this vitiation appears plain, and did ſo appear to the judges below; nor is it any objection, that is not obvious to every eye without the help of glaſſes; when deeds are falſified care is generally taken to do it in the moſt artful way.

The penalty on default of payment inſerted in the bond is 300 merks, which according to the cuſtom in Scotland, is a penalty ſuitable to 1730 merks, but no way ſuituable to 1730*l.*, nor is it uſual to inſert a penalty but in money of the ſame denomination with the principal ſum.—A deed vitiated or falſified can have no credit at all in judgment; it is not the deed executed by the party; and no man or his heirs can be ſued upon a deed not executed by him.—After the vitiation of a bond it is entirely uncertain what word or ſum was originally inſerted in it, or if any ſum was mentioned in it.

But even ſuppoſing this bond were not ſo apparently vitiated, yet it muſt be preſumed, that it had never been fully executed or delivered. For though it be dated in 1674, no ſuit has been brought or demand made upon it againſt Robert Linn, the pretended debtor, or his heirs to this day. And John Kennedy having been debtor to Robert Linn by bond, for a ſum which with the intereſt exceeded the ſum in this bond, at the time it is pretended to have been executed, there was no good reaſon why Robert Linn ſhould have granted this bond, and not rather imputed the money towards ſatisfaction of the debt owing to him, and given John Kennedy an acquittance. And it is equally unreaſonable

ſonable to believe that John Kennedy would have executed the other to Robert Linn in 1682, if this bond had been then owing to Kennedy, without making any mention of it.

In 1684 Robert Linn's children were confirmed executors to him, and an inventory was given up not only of the debts, and aſſets of the ſaid Robert Linn, but alſo of the debts owing by him; and, at taking out ſuch confirmation John Kennedy became cautioner for the executors; yet no mention was there made of any debt owing to him, which it cannot be ſuppoſed he would have omitted if there really had been any debt owing to him. In 1690, the bond upon which the reſpondent claims, was ſo far put to execution againſt John Kennedy himſelf, that he was put in priſon, and continued there for a conſiderable time, without any mention of this pretended counter claim, which had it been a true debt, would have afforded him a good plea, and ſaved him from impriſonment.

With regard to Captain Mac Culloch's action of forthcoming, he was only a creditor to Robert Linn, and his heirs; he could not know the circumſtances of their affairs, nor whether the bond was a true one or not. There remained after allowance of this bond as much of the ſums he then ſued for, as was ſufficient to anſwer his demand, and therefore he did not trouble himſelf to enquire whether there was ſuch a bond or not; the bond was not produced in the action, nor were the heirs of Robert Linn, then minors, appearing as parties in that ſuit.

Judgment, 13 April 1724.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutors therein complained of be affirmed: And it is further ordered that the appellants do pay or cauſe to be paid to the reſpondent the ſum of* 20l. *for his coſts in reſpect of the ſaid appeal.*

For Appellants, *C. Wearg.* *Will. Hamilton.*
For Reſpondent, *Ro. Dundas.* *C. Talbot.*

Ex parte

James Hamilton of Dalzell, Eſq; - *Appellant;*

James Hamilton brother to William Hamilton, of Orbieſtoun, deceaſed, and the creditors of the ſaid William Hamilton, and James his Son, - - - - *Reſpondents.*

Caſe III.
Bruce, 12 Nov. 1714.

18th *April* 1724.

Service of heirs.—An eſtate being diſponed to a father, and failing him to his eldeſt ſon, and the heirs male of his body, with other ſubſtitutions; and the eldeſt ſon having ſurvived the father was inſeſt thereon, and died afterwards without ſerving heir to him: the Court found the right to the eſtate not fully veſted in the ſon without a ſervice, but the judgment is reverſed upon appeal.

Death-bed.—The Court having found that death-bed could be pleaded by an heir cut off by two prior deeds, and by creditors, the judgment is reverſed.

Did, contracting the ſickneſs at the time of executing the deed, conſtitute death-bed?

Fiar abſolute limited.—A father grants an abſolute diſpoſition to his ſon, which is not completed by infeftment or by making up ſchedules in terms thereof the ſon afterwards joins with the father in making two new ſettlements of the eſtate, and the father who ſtill continued in poſſeſſion grants a diſpoſition to a third party, after the ſon's death: the Court having found theſe poſterior diſpoſitions were not of prejudice to the ſon's creditors, the judgment is reverſed.

SIR John Hamilton of Orbieſtoun, deceaſed, having granted ſeveral bonds for ſums of money, greater than the value of his eſtate, to a Mr. Walkinſhaw, in 1653, this Walkinſhaw obtained decrees of appriſing of the ſaid eſtate; and having thereupon taken out a charter from the then Ducheſs of Hamilton, the ſuperior, he was duly infeft in the premiſes, in 1659.

This Walkinſhaw afterwards diſponed the ſaid appriſing, and all his right to the premiſes to Sir James Hamilton, ſon of the ſaid Sir John; whom failing to William his eldeſt ſon, and the heirs male of his body; whom failing to James Hamilton (the reſpondent) ſecond ſon of the ſaid Sir James, and the heirs male of his body; whom failing to the other perſons therein mentioned. Under this diſpoſition Sir James enjoyed the eſtate during his life; and, after his death, William his ſon entered thereto, and took infeftment upon Walkinſhaw's diſpoſition.

In 1699, William Hamilton made a voluntary ſettlement of his eſtate in favour of James his ſon, but he ſtill continued in poſſeſſion, and afterwards ſold a conſiderable part of his eſtate for payment of debts by him contracted. In 1704, a contract was executed at Cramond, between William the father and James his ſon, whereby William the father agreed to ſettle the eſtate upon James the ſon, and the heirs male of his body; whom failing upon the heirs male of the body of the reſpondent James; whom failing upon the appellant, and the heirs male of his body, with ſeveral other ſubſtitutions of heirs; and this deed they agreed ſhould be drawn and executed at the ſight of Lord Whitelaw.

No

No deed was executed in terms of this contract; but in February 1708, William the father and James his ſon made a new entail or ſettlement of the eſtate, executed at Buoy of the Nore, whereby failing heirs male of their own bodies, they diſponed the ſame to Sir David Hamilton, (ſince deceaſed), and the heirs male of his body; with ſeveral other ſubſtitutions of heirs. In this deed, the reſpondent James, and the heirs of his body, were not only paſſed over, but it contained a clauſe, that if the ſaid Sir David Hamilton, or any of the heirs of entail, ſhould ever convey any part of the premiſes to the reſpondent James, or his heirs, the ſame ſhould be a forfeiture of the right of ſuch perſons; and this deed contained a power of revocation.

The ſaid ſettlements executed by the father and ſon were all gratuitous, and none of them was followed with ſaſine, or put upon record. And James the ſon having died without heirs of his body, William the father on the 26th of December 1711, diſponed his lands of Orbieſtoun, and others to the appellant; upon this diſpoſition the appellant was infeft; on the ſame 26th of December, William the father conveyed to the appellant ſeveral debts due to him by the Lord Sempill. This William Hamilton died on the 29th of January 1712.

After his death the reſpondent James his brother, and heir at law, applied to be ſerved heir of proviſion to Sir James Hamilton their father, paſſing by William the brother, in order to avoid all his acts and deeds. The ground of his claim was, that under the diſpoſition by Walkinſhaw, Sir James was veſted in the fee of the eſtate; and William his ſon having neglected to ſerve heir to him, the reſpondent, who was the next ſubſtitute in Walkinſhaw's diſpoſition, was entitled to take up the ſucceſſion by a ſervice to his father. The appellant oppoſed this ſervice, and the Court of Seſſion having appointed two of their number to be aſſeſſors to the macers, the appellant contended before them, that the title whereby the ſaid eſtate was poſſeſſed, was the diſpoſition from Walkinſhaw, in which Sir James Hamilton was merely life-renter, and his ſon William fiar; and therefore that William the ſon had a right to take the eſtate without ſerving heir to Sir James, to whom he was nominatim ſubſtitute in the deed. On the 29th of January 1713, the Court of Seſſion "found that James "Hamilton, the reſpondent, might ſerve heir in general to "William his brother, Sir James his father, and Sir John his "grandfather, notwithſtanding of the diſpoſitions to the appel-"lant; and that he might ſerve heir in ſpecial to William his "brother, Sir James his father, and Sir James his grand-father, "in any other lands not contained in the ſaid charter of appriſing "and ſaſine thereon." To this interlocutor, the Court adhered on the 25th of February thereafter.

The reſpondent was afterwards ſerved heir of proviſion to Sir James his father, in the lands contained in the ſaid charter; and the retour being oppoſed by the appellant, the Court on the 22d of January 1714, "allowed the ſervice as claimed to be retoured "with this proviſion that, before retouring, the reſpondent James "Hamilton ſhould give an obligation ſubjecting himſelf to the "lawful

" lawful debts and deeds of the ſaid William his brother, as heir " *cum beneficio inventarij* to the ſaid William."

Upon the application of ſeveral of the creditors of William Hamilton, the Court on the 11th of February 1714, " remitted it " to the Lord Fountainhall to hear parties on this point, viz. " Whether or not the eſtate diſponed by Walkinſhaw was after " the deceaſe of Sir James Hamilton, fully veſted and ſettled in " the perſon of the deceaſed William Hamilton, without the " neceſſity of a ſervice, and if the ſaid William was fiar, or if " the ſaid eſtate, or any part thereof was in *hæreditate jacente* of " the ſaid Sir James Hamilton." Parties were accordingly heard on this point, and after a report to the Court, their lordſhips on the 10th of June 1714, "found that the eſtate diſponed by " Walkinſhaw was not after the deceaſe of Sir James Hamilton, " fully veſted and ſettled in the perſon of the deceaſed William " Hamilton without the neceſſity of a ſervice; and therefore al- " lowed the ſervice to be retoured, in terms of the interlocutor of " the 22d of January laſt."

Pending this queſtion, the reſpondent James, and ſeveral creditors of the ſaid William Hamilton, brought their action of reduction of the two deeds executed by William in favour of the appellant, on the ground that they were in fraud of creditors, and executed not only when the grantor was in the eye of the law, a bankrupt, but when he was on death-bed. The appellant agreed that the creditors of William the father ſhould be preferred, ſo far as they were truly creditors, but he inſiſted that the ſaid conveyances could not be reduced as granted on death-bed at the ſuit of creditors, that being an action only competent to the heir; and that the heir in this caſe was cut off by two prior ſettlements made long before theſe in queſtion. The Lord Ordinary on the 28th of January 1713, " found that the reaſon of reduction, that the " ſaid writs were granted by the ſaid William Hamilton on death- " bed, at leaſt after contracting the ſickneſs of which he died, " without going to kirk, or market, or living 60 days after, rele- " vant to be proved: and alſo that the ſame were granted by the " ſaid William Hamilton, when he was bankrupt and inſolvent " and under diligence by horning and caption, and had retired, " abſconded or forceably defended himſelf, relevant to be proved;" and a time was limited for bringing ſuch proof. To this interlocutor, the Court adhered on the 12th of February thereafter.

Upon the application of the appellant, diligence was granted for recovery of the ſettlement made of the premiſes in 1708, upon Sir David Hamilton. Several witneſſes having been examined the cauſe was ſet down for hearing; but before the ſame came on the creditors of James the ſon, applied to the Court for liberty to concur with the creditors of William the father in the action, which was allowed. The cauſe coming to be argued the appellant contended that by the deed 1708, the reſpondent James, as heir at law, was expreſsly excluded, as well as by the contract at Cramond, in 1704. On the other hand the reſpondent James contended, that he was not excluded by the laſt ſettlement, but if he was, it was

jus

jus tertij to the appellant, who could claim no right by that settlement. The appellant in reply, contended that the power of revocation was to be by the father and son, if both alive, yet upon the death of the son, that such power survived to the father; and that the appellant being in possession, it was sufficient for him to shew, that the title was not in the respondent; but that the appellant had an immediate interest, he being next substituted by the deed at Cramond to the heirs male of the respondent's body, who were excluded by the subsequent settlement; and that therefore the estate descended to him. The Lord Ordinary on the 12th of July 1715, "found that by the contract dated at Cramond, the "estate of Orbiestoun was entailed to James the son, with power "to the said James, with consent of his father to alter, and that "in virtue thereof the said contract was altered by a subsequent "entail dated at *Buoy of the Nore*, and found that the father had no "power to alter the said second entail by himself alone, and found "that the respondent James, the right heir and the descendants of "his body are not excluded from the succession by the clause in "the said second entail. And in regard the appellant has no "right or title by the second entail, preferable to the respondent "James, that it is *jus tertij* to him so found thereon; and that "it was competent to the respondents, the creditors to quarrel the "dispositions granted by William the father, to the appellant "upon the head of death-bed." And to this interlocuter of the Lord Ordinary, the Court adhered on the 15th of June 17[illegible].

After advising the proof of the alleged death-bed, the Court on the 7th of July 1716, "found it proved that William the "father contracted the sickness whereof he died, at the time "granting the two dispositions to the appellant, and that he went "not to kirk, or market, after granting thereof." On the 17th of November thereafter, the Court "found the qualification "alleged on the act of Parliament 1696, not relevant to reduce "the disposition, except in so far as the same may be made use of "for the payment or security of debts anterior to the said disposition."

The respondents, the creditors of James the son, insisted that the dispositions to the appellant might be reduced in regard they were granted by the father, after he was divested by a conveyance made to his son in 1699. The appellant insisted that this disposition was varied by the articles at Cramond, and that the father still continued in possession and afterwards sold part of the estate. But the Court upon the 22d of December 1716, "found "that the minutes of contract entered into at Cramond did not "innovate the former disposition granted by the said William the "father to his son, in so far as concerns the lands of Orbiestoun, "in prejudice of the son's creditors."

The appeal was brought from "several interlocutors of the Lords "of Session, of the 28th and 29th of January, the 12th and 25th of "February 1713, the 22d of January, 11th of February and 10th "of June, 1714, the 21st of January, 11th of February, and 12th "of July 1715, the 15th of June, 7th of July, and 22d and 29th

Entered, 21 Jan. 1723-4.

" 29th of December 1716, and 3d and 10th of January next " following (*a*)."

Heads of the Appellant's Argument.

The eſtate in queſtion being conveyed by Mr. Walkinſhaw to Sir James Hamilton, and after his deceaſe to William his eldeſt ſon, and the heirs male of his body, Sir James was only life-renter, and William fiar; conſequently there was no occaſion for William to ſerve heir to Sir James. For this the authority of Lord Stair is expreſs: " if heritage (ſays he) ſhould be granted " for example to John, and after his deceaſe to William, and his " heirs, John would be thereby naked life renter, and William " fiar, who could not be ſerved as heir to John." Stair B. 3. Tit. 4. § 33.

Suppoſing Sir James had been fiar, yet William being nominatim ſubſtitute to him, he upon Sir James's death, became ſeiſed in fee of the eſtate, without any neceſſity of a ſervice: for in that caſe, *mortuus ſaſit vivum*, the conveyance to William *nominatim* being conſidered as an immediate conveyance or intereſt, veſted in William, ſubject and expectant upon the contingency of his father's death only.

William the ſon entered upon the eſtate without any ſervice, continued in poſſeſſion of it for about 40 years as abſolute proprietor, ſold the greateſt part of the eſtate, and granted heritable ſecurities over it to a conſiderable value. If a ſervice were neceſſary, then he had no right, and the ſale and heritable ſecurities are void; yet by one of the interlocutors appealed from the eſtate is ſubjected to all of them. If the eſtate is to be ſubject to William's other deeds, why not to thoſe in favour of the appellant; and if ſubject to them, by which the eſtate was conveyed to the appellant, there was no room for the reſpondent James to ſerve heir of proviſion to his father.

If the reſpondent James had no title to be ſerved heir, he had no right to bring any action for reducing the conveyances made to the appellant, as being granted upon death-bed, that action being only indulged to an heir.

But ſuppoſing he were heir, yet this action ought not to have been ſuſtained, becauſe there is no preſumption of the grantor's being impoſed upon to his prejudice in this caſe, for the reſpondent was expreſsly deprived of the right of ſucceſſion, not only by the contract in 1704, but by the deed in 1708, in the laſt of which the giving or conveying any part of the eſtate to the reſpondent, is declared a forfeiture upon the perſon making ſuch conveyance. At all events ſuch action was not competent to creditors.

Though William the father in 1699, made a voluntary ſettlement of his eſtate in favour of James the ſon, ſubject to his debts in a ſchedule annexed, and reſerving to himſelf a life-rent of certain lands; yet that was never completed, for the in-

(*a*) Some of theſe interlocutors are not ſtated in the appeal caſe.

ventory of debts was never made up, nor any ſchedule annexed. The very lands which the father was to life-rent were never filled up, but a blank was left for them; and the father ſtill continued in poſſeſſion and afterwards ſold the greateſt part of the eſtate. Beſides that was entirely varied by the agreement between the father and ſon in 1704; and if the ſon had any claim by the firſt conveyance, as it was but a perſonal right, he could certainly waive that, and the ſubſequent agreement in 1704, was an actual waiver thereof. All the debts claimed by the creditors of James were contracted after the ſaid agreement of 1704, by which he had waived the former conveyance.

Counſel appearing only for the appellant, they were fully heard, and due conſideration had of what was by them offered: and this cauſe having been formerly ſet down to be heard *ex parte*, in default of any anſwer of the reſpondents, or any of them, after a peremptory day appointed for that purpoſe, and the reſpondents having been after that ſo far indulged, as to have the cauſe put off to a further day, with liberty for them to be then heard, and in order thereto to put in their anſwer to the ſaid appeal; and yet this day not appearing, but deſerting their defence and oppoſition to the ſaid appeal,

Judgment, 18 April, 1724.

It is ordered and adjudged, that the ſaid ſeveral interlocutors complained of in the ſaid appeal be reverſed; and it is hereby declared, that it is the opinion of this Houſe that the ſaid William Hamilton, elder brother of James Hamilton the reſpondent, was in virtue of the diſpoſition from Walkinſhaw, in the pleadings mentioned, fully veſted in the fee and property of the eſtate of Orbieſtoun, without the neceſſity of ſerving heir to Sir James Hamilton, his father. And that the two diſpoſitions by the ſaid William Hamilton the 20th Day of December 1711, in the pleadings mentioned, in favour of the appellant were good and effectual deeds, and the ſame are hereby eſtabliſhed, ſubject to the true and lawful debts of the ſaid William Hamilton.

For Appellant, *Dun. Forbes. Will. Hamilton.*

On the point of the *ſervice of heirs*, the judgment of the Court of Seſſion, which is here reverſed, is ſtated as an exiſting caſe in the Dictionary of Deciſions, vol. II. p. 367. *Service and Confirmation.*

The other points appealed are alſo of great importance.

Thomas Paterſon, Eſq. - - *Appellant*; Caſe 112.
Archibald Ogilvie, and Anthony Murray, Eſq. *Reſpondents.*

20th *April* 1724.

Præſt.—Qualified Condeſcendance.—In the reduction of a bond, bearing to be for money lent, for want of an onerous cauſe, the defender acknowledges that the conſideration was the future transfer of South Sea ſtock, and ſtates that ſuch transfer was afterwards made accordingly to the purſuer's order. This quality in the condeſcendance did not prove againſt the purſuers.

South Sea Company—Act. 7 G. 1. ſtat 2.

Foreign.—It was no nullity in a bond that it was executed in England, in the Scotch form.

Coſts.—An Affirmance with 40l. coſts to one reſpondent.

ON the 15th of Auguſt 1720, the reſpondents agreed to purchaſe from the appellant 1000*l.* South Sea ſtock, with the Midſummer dividend at 1150*l.* per cent, and the appellant gave to each of the reſpondents a note, obliging himſelf to transfer to each of them 500*l.* South Sea ſtock, with the Midſummer dividend, as ſoon as the books of the ſaid company opened; and the reſpondents executed a bond in the Scots form to the appellant for 11,500*l.* bearing to be for money lent and advanced, payable on the 25th of March then next.

Diſputes afterwards ariſing relative to this bond, the appellant on the 28th of September, raiſed and executed letters of inhibition in Scotland againſt both the reſpondents. In November following a bill was exhibited in their names in the Court of Chancery, againſt the appellant relative to this bond, and the South Sea ſtock; but they afterwards obtained an order to amend their bill, and ſoon after they took an order to diſmiſs the ſame.

The reſpondents thereupon brought an action againſt the appellant before the Court of Seſſion to reduce and ſet aſide the ſaid bond, as being without an onerous cauſe; for that the ſtock which was to have been transferred by the appellant, and which was the only conſideration of the bond never was transferred to them or their order. The Lord Ordinary on the 29th of July 1721, ordered both parties to condeſcend upon the facts in the caſe.

In obedience to this order, the appellant ſtated, that the true cauſe of the granting and delivery of the bond craved to be reduced was his granting and delivering to each of the purſuers an obligatory note for transferring to each of them 500*l.* South Sea ſtock, with the Midſummer dividend, which notes were granted in reſpect the books were then ſhut; and which 1000*l.* was accordingly on or about the 26th of Auguſt 1720, transferred to the purſuers their order *reſpective*, viz. to Mr. Powell of the South Sea Company; and that one of the purſuers having brought to the defender a permit for transferring the ſaid ſtock to Mr. Powell, upon a loan of 4000*l.* he at their deſire did accordingly transfer the ſame, and received the ſaid 4000*l.* and at their deſire, applied the ſame as

follows, viz. at the desire of Mr. Ogilvie 2000*l.* to the credit of Captain Abercromby's account with the defender; and at the desire of Mr. Murray, the other 2000*l.* was applied to Mr. Murray's own credit, in part of a note for 15,925*l.* due by him to the said defender; with which transfer and application of the 4000*l.*, the pursuers were so fully satisfied, that Mr. Ogilvie gave up to the defender the note, obliging him to transfer 500*l.* of the said stock to him; and Mr. Murray was content to have done the same, but declared he had lost his pocket book, and in it the said note. And the defender's procurators further declared that the Midsummer dividend was still ready to be transferred by the defender to the pursuers. And they stated that they made that acknowledgement under protestation, that the same should not be disjoined or separated, but that the same, and every part of it should be understood and received as the true matter of fact, which passed between the pursuer and defender, on which he was willing to make oath.

The respondents on the other hand jointly declared, that at the opening of the books, they concerted that they should cause transfer their two sums of 500*l.* stock to Colonel Francis Farquhar for their joint behoofs; but denied that such stock was transferred by their order, or with their approbation to Mr. Powell, for obtaining a loan of 4000*l.* Mr. Ogilvie acknowledged that the said obligatory note, granted by the defender to him, was retired by him to the defender upon verbal assurance that he had transferred to Colonel Farquhar for his behoof the said 500*l.* stock, which he afterwards discovered never to have been transferred either to Colonel Farquhar, or any other person having power from him.

The Court having upon the petition of the respondents directed the appellant to make answer to several other facts then charged by them, the appellant's procurators acknowledged that between the 22d of August 1720, and the 29th, the day of making the transferance to Powell on their behalf, he, the appellant, had made further transferance on the loan of 5000*l.* South Sea stock to Mr. Powell; that the loan stood charged on the appellant's account in the company's books, neither did they know of any document, or legal evidence for making it appear, that the said stock or the reversion thereof was truly vested in the pursuers, so as that they had access to redeem and sell, or dispose of it upon payment of the loan; and that the same was in trust in the appellants person, wherewith the respondents were satisfied when Mr. Ogilvie delivered up the note to the appellant; and that the appellant was always ready to deliver to the respondents an order on the treasurer of the South Sea Company, to entitle them to redeem the said stock, but the same was never demanded.

Thus far the respondents proceeded jointly in this action of reduction; but the respondent Murray who was indebted in a large sum of money to the appellant, having made some agreement with him, ordered the action to be deserted on his part.

After this the respondent Ogilvie proceeded in the action for himself, and prayed that the appellant should be ordered to condescend upon

upon what ſtock he was entitled to in his own right on the 15th of Auguſt 1720, or within ſix days thereafter. The Lord Ordinary made ſuch order accordingly, and the appellant offered in general terms to prove that at the time of the ſale he was entitled to a much greater quantity of ſtock than he ſold to the reſpondents, but he declined to ſet forth an account of all his tranſactions as unreaſonable.

Upon hearing the cauſe, the reſpondent inſiſted upon theſe grounds of reduction, 1ſt, that the bond was null, having been executed in England, in the Scotch form. 2dly, That the bond was granted without a valuable conſideration. 3dly, That in terms of the act of parliament 7 Geo. 1. ſtatute 2. it was void, the appellant not being poſſeſſed of, or entitled to the ſtock in terms of the act. And 4thly, That the contract being unperformed on the 29th of September, 1721, in terms alſo of ſaid act ought to have been regiſtered, which it was not, and that therefore the ſame was void and null. After a hearing upon theſe points, the Court on the 1ſt of Feburary 1724, "repelled the reaſon of reduction, "that the bond was executed in England, after the Scots form; but "found that the cauſe of granting the bond craved to be reduced, "was the defender's obligatory note, for transferring to the purſuer "Ogilvie 500*l.* capital South Sea ſtock, with the Midſummer "dividend; and that the defender's declaration of the ſpecial "fact does not qualify or prove that a transfer was accordingly "made, or that any benefit did accrue to the purſuer for the "500*l.* ſtock which ought to have been transferred: and alſo found "that the contract not having been performed, ought to have been "regiſtered, conformably to the act of Parliament; and alſo found, "that the defender not having given in a ſpecial condeſcendance "of any ſtock in his perſon, at the date of the bond, nor within "ſix days thereafter, he is preſumed to have had none."

The appeal was brought from "part of an interlocutory ſentence "or decree of the Lords of Seſſion, made the 1ſt day of February "1724." Entered 13 Feb. 1723-4.

Heads of the Appellant's Argument.

As the only proof made uſe of to ſet aſide the bond in queſtion was the acknowledgment of the appellant, that it was given in conſideration of an agreement for the ſale of ſtock; ſo if the reſpondents would take any benefit from that acknowledgement they muſt take it altogether, and admit that part likewiſe to be true which mentions that the ſtock was transferred to their order. If the reſpondents have taken this as their only proof, it would be extremely hard upon the appellant, if one part of the proof were to be ſupported, and the other not, eſpecially in a caſe where there were no parties to the real tranſaction, but the appellant and reſpondents. The actual transfer of the ſtock to the order of the reſpondents appears alſo by the circumſtance of the reſpondent Ogilvie's delivering up to the appellant his obligatory note, which was his ſecurity for the transfer of the ſtock, and the conſideration for granting the bond. And the reſpondent Murray would have done the ſame, had he not loſt his pocket book and the note in it.

The counter allegations of the reſpondent Ogilvie ought not t have been taken as true, without proof.

This transfer, like all others upon loans, was made abſolutel without any power of redemption expreſſed; but theſe transfe being made to an officer named for that purpoſe, a retransf would have been made at any time upon payment of the mone The appellant was always ready to have given the reſpondents a declaration, if they had deſired it, that the ſtock was theirs, b they never did.

With regard to the objections upon the act of parliament, th the tranſaction was not completed, the appellant transferred wh he was deſired to do; and he always was willing upon payment what was due to him upon the bond, to transfer the Midſumm dividend upon ſaid ſtock, and all the profits thereof to the re ſpondents. But ſince the reſpondents gave the appellant a bon for the payment of a certain ſum of money, though that bond wa given in conſideration of notes to transfer ſtock, yet there could be no occaſion to regiſter the ſame; for nothing is required by the act to be regiſtered but contracts for the ſale of ſtock, which in no ſenſe a bond for payment of money was; and eſpecially ſince be fore that act, the appellant had performed his part and transferred the ſtock. For the ſame reaſon the appellant was not obliged to make it appear, that he was poſſeſſed of ſtock at the time of grant ing the bond, or ſix days after. He was ready to prove that at the time he was entitled to a much greater quantity of ſtock, but he declined to give any account of his particular circumſtances, as he apprehends he might juſtly do.

Heads of the Reſpondent Ogilvie's Argument.

The confeſſion of a party would be entirely uſeleſs, if he were permitted to add other facts foreign to the queſtion, and that thoſe facts ſhould be taken to be true upon his bare allegation. In this caſe the appellant acknowledged, that though the bond was expreſſed to be for money lent, yet it was really given for ſtock, to be transferred at a future time; and this muſt be taken to be true. But *he muſt prove* that the ſtock was actually transferred. As he hath ſet forth the matter, ſeveral facts muſt be admitted inſtead of being proved; firſt that the reſpondent ordered him to transfer the ſtock to Powell; 2dly, That he ordered him to borrow and receive the money upon it; and 3dly, That he ordered him to apply that money to his own uſe, in diſcharge of a debt due to him from another perſon. And after all the appellant admits that the reſpondent could not have redeemed the ſtock if it had riſen, without an order from the appellant, and which never was given; nor does he pretend that he gave the reſpondent any note, or receipt whereby the latter might charge Captain Abercromby with the 2000*l.*

The reſpondent's note was gained from him by ſurprize, upon the appellant's affirming that he had transferred the ſtock to Colonel Farquhar, which was not true; and it is contrary to all law, that any one ſhould profit by his own deceit.

pears even from the appellant's own ſhewing, that the con-
as not performed; for he admits, that he transferred the
Powell, not in truſt for the reſpondent but for himſelf and
rt of the ſtock, viz. 100*l.* was never transferred at all; and
e other part of the contract, viz. the payment of the money,
far from being performed, that the appellant's action is to
performance of it, and therefore it is plainly within the act,
void, not having been regiſtered. And as the appellant de-
condeſcending upon what ſtock he had, it muſt be held
had none, and ſo the contract was alſo void by the act,
account.

r hearing counſel *It is ordered and adjudged that the petition* Judgment,
peal be diſmiſſed, and that ſo much of the interlocutory ſentence 20 April
e as is therein complained of be affirmed; and it is further 1724.
, that the appellant do pay, or cauſe to be paid to the reſpondent
Ogilvie the ſum of 40l. *for his coſts in reſpect of the ſaid*

Appellant, *P. Yorke. Dun. Forbes. Will. Hamilton.*
Reſpondent Ogilvie, *C. Wearg. C. Talbot.*

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reſpondent Murray in this caſe, put in a long and ſpecial
, mentioning that the condeſcendance appearing in his name
land, had been put in without his knowledge or conſent.

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as Paterſon, Eſq. - - *Appellant;* Caſe 113.
es Cockburn, Eſq. - - *Reſpondent.*

11th Jan. 1724-5.

Mutual Contract, South Sea ſtock.—At compromiſing a tranſaction relative to South Sea ſtock, one of the parties grants an obligation to the other, to pay him a certain ſum with this proviſo, that whereas the obligee intended to ſue two of the directors to make void his own bargain, if he ſucceeded, the obligor was to be free of his obligation. The obligee having got an abatement by compromiſe from the directors, the obligor was entitled to a proportional abatement.

20, ſome tranſactions took place between the parties, re-
e to South Sea ſtock, which was ſold by the appellant to
pondent; but every matter relative to the purchaſe not
been finally arranged, after ſtock had completely fallen in
a compromiſe was made between them, in conſequence
ich the reſpondent on the 10th of November 1720, granted
pellant his note, or obligation in the following terms:
romiſe to pay to Thomas Paterſon Eſq., or his executors, and
iniſtrators, 100*l. per annum*, to commence from Chriſtmas
, in half yearly payments, till the ſum of 1000*l.* is paid,
ided I continue in any buſineſs under the government of
yearly value of 100*l. per annum*, otherwiſe this obligation

" to be void from the time I am diſplaced from ſuch bu
" and this obligation to take place and commence again
" any time I am replaced in buſineſs under the governm
" the above ſum is ſatisfied. And whereas Mr. Paterſon
" to ſue Sir John Lambert, and Sir Theodore Janſen t
" void a bargain of 6000*l.* South Sea ſtock, he bought o
" at 1000*l.* per cent; if Mr. Paterſon ſucceeds in making
" bargain with them, then I am diſcharged from this obli
" if he ſhould not, then this obligation is to be made gooc
" according the conditions expreſſed."

The appellant after the date of this obligation made a action with Sir John Lambert, and Sir Theodore Jan which he was freed of 42,000*l.* part of the price of ſaid ſtock, but 18,000*l.* which he had paid them at the time of t chaſe was retained by them; and no ſuit was brought by pellant againſt them. The reſpondent conceiving himſel relieved of his obligation in conſequence of this tranſacti fuſed to implement the ſame.

The appellant thereupon in 1723, brought his action the reſpondent before the Court of Seſſion, to compel him to payment of the arrears of the ſaid annuity, and to pay th thereafter as it fell due.

The reſpondent inſiſted, that the appellant in terms obligation entered into by the reſpondent, ſhould have ſu directors to be rid of his bargain, which was a ne ſtep to validate the reſpondent's obligation: at all events ſpondent contended, that the appellant ſhould communic him an eaſe on his obligation, proportionate to that gra the directors to the appellant on his bargain with them.

The cauſe being argued on theſe points, the Lord Ordin the 24th of December 1723, " found that the appellant's " cuting the two directors to be free of the 6000*l.* capita " ſold to him at 60,000*l.* was a condition which he ought t " implemented; but found it relevant to ſubject the reſp " to a ſhare of the ſum in his obligation, in proportion " ſhare of the 6000*l.* tranſacted by the appellant with the " tors, that the appellant entered into a tranſaction with th " a certain ſum of money, to be paid by him, to be proved " and aſſigned the 10th day of February thereafter for tha " poſe." And to this interlocutor his lordſhip adhered 26th of the ſaid month of December.

The appellant reclaimed, and after anſwers for the reſp the Court on the 16th of January 1724, " adhered to th " part of the Lord Ordinary's interlocutor, finding th " Paterſon's proſecuting the two directors to be free of " capital South Sea ſtock, ſold to him at 60,000*l.* was " dition which he ought to have implemented, but wit " quality, that he might alſo have tranſacted with them " found that Mr. Cockburn, by the conception of the ob " purſued on, is entitled to a proportional abatement of th " of 1000*l.* purſued for eſſeiring to the abatement granted

" di

" directors to Mr. Paterſon, and found the directors giving up " the ſum of 18,000*l.* to the Houſe of Commons, as the ſum paid " by Mr. Paterſon to the directors as the price of the 6000*l.* " capital-ſtock, ſold by them to Mr. Paterſon, is a ſufficient " proof of the terms of the tranſaction; and found it probable " by writ or witneſſes, as alſo the terms of the ſaid tranſaction, " reſerving *contra producenda.*" And to this interlocutor the Court adhered on the 19th day of February thereafter.

The appeal was brought from " ſeveral interlocutory ſen- Entered, " tences of the Lords of Seſſion of the 24th and 26th of ; Mich " December 1723, and the 16th of January and 19th of 1723-4. " February 1724."

Heads of the Appellant's Argument.

The agreement between the appellant and reſpondent was, that in caſe the contract with the directors ſhould be declared void, and the appellant thereby have the money returned, which he had paid upon the contract, then the reſpondent ſhould have his note delivered up to him. The only event in which the reſpondent was to have any benefit, was if the agreement was made void, and it was the only one in which he could deſire any benefit; for as the appellant's original agreement with him was for 1000*l.* per cent., the ſame price at which he had agreed with the directors, and the appellant had already compounded with the reſpondent for 1000*l.* there could be no handle for any further agreement or compoſition, unleſs the appellant ſhould have made void his agreement with the directors, and received back his whole money, the benefit of which he intended to communicate to the appellant.

It can never be imagined, that the appellant, or any man in his right ſenſes, after he had already given ſo great an eaſe to the reſpondent, as to agree to accept of 1000*l.* payable in ten years, and that ſubject to a contingency, in lieu of 10,000*l.* would agree to communicate to him the benefit of any tranſaction he might make with the directors, eſpecially if upon the footing of that tranſaction, the appellant was to pay more than the ſum in any event payable by the reſpondent: in this caſe the appellant has paid 3000*l.* for every 1000*l.* ſtock, and the ſum payable by the reſpondent, conſidering the different times at which it is to be paid, and the contingency it is ſubject to, cannot be valued at more than 5 or 6 hundred pounds. Since then the appellant pays almoſt ſix times as much for every 1000*l.* ſtock he bought from the directors, as the appellant in any event is to pay for the like quantity of ſtock, with what equity or juſtice can the reſpondent claim any benefit from this tranſaction, or inſiſt upon a proportional abatement?

The appellant apprehends he was under no neceſſity to ſue the directors, it was entirely optional to him: he did indeed adviſe with counſel upon his caſe, and by their advice the tranſaction was made whereby the appellant loſt the ſaid ſum of 18,000*l.* it being the opinion of counſel the ſaid agreement would not be voided and ſet aſide. And the appellant believes there are few inſtances,

inſtances, where any South Sea contract has been compounded at a more eaſy rate, than this with the reſpondent.

Heads of the Reſpondents' Argument.

Since the expreſs condition of the obligation was, *that in caſe the appellant prevailed in the ſuit againſt the directors, the obligation was to be void*, this neceſſarily implied, that the ſuit was to be inſiſted in, and the appellant could not by any voluntary tranſaction of his, without the conſent of, or notice given to the reſpondent, deprive him of the benefit of that condition; and conſequently ſince the appellant has made ſuch tranſaction without the conſent of, or notice to the reſpondent, the condition muſt be looked upon as fulfilled in the reſpondent's favours.

Upon the ſuppoſition, that the appellant might lawfully have compounded with the directors inſtead of inſiſting in his ſuit, then ſtill the reſpondent ought to have a proportional benefit by that tranſaction, and ſince he was to have paid nothing in caſe the appellant had been relieved entirely of the ſum of 60,000l. now that the appellant is relieved of 42 parts of the 60, the reſpondent ought likewiſe to be relieved proportionally of the 1000l. contained in his obligation. If it were otherwiſe, then it muſt follow, that if the appellant had paid only 5*l.* to the directors, the reſpondent muſt have paid him the whole 1000l. which the reſpondent apprehends is highly abſurd.

If it be true, as the appellant has himſelf affirmed, that the 1000l. ſtock, with which he would charge the reſpondent, was a part of the 6000l. purchaſed by him from the directors; and if it be likewiſe true, as the appellant affirmed by a letter under his own hand to the reſpondent, that he ſold the ſtock, with which he charges the reſpondent, at 525l. per cent., then he gained upon this very 1900l. ſtock, 225l. per cent., ſince by the tranſaction with the directors, he paid but 300l. per cent. for it; and conſequently he can have no juſt demand on this account againſt the reſpondent.

Judgment, 11 Jan. 1724-5. After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the ſaid ſeveral interlocutory ſentences therein complained of be affirmed.*

For Appellant, *Dun. Forbes.* *Will. Hamilton.*
For Reſpondent, *Ro. Dundas.* *C. Wearg.*

Alexander Bayne, Advocate - - *Appellant;* Caſe 114.
The Commiſſioners and Truſtees for the Forfeited Eſtates - - - *Reſpondents.*

13th *Jan.* 1724-5.

Temporary Juriſdiction in the Commiſſioners for the Forfeited Eſtates.—By ſeveral acts of Parliament, the claims relative to forfeited eſtates, were to be entered before the commiſſioners by a day certain; in certain caſes application was to be made to the Court of Seſſion. A perſon miſtaking his remedy, applied to the Court of Seſſion, and obtained a judgment in his favour; but that was afterwards (among many others) annulled by the Houſe of Lords, for want of juriſdiction: he then entered a claim before the truſtees, which they refuſed to conſider as not being entered within the time limited: and an appeal to the Court of Delegates was alſo refuſed, "leaving the petitioner "in his circumſtantiate caſe, to make application for redreſs to the proper "powers." The judgment of the Court of Delegates is affirmed.

THE Earl of Southeſk, attainted for treaſon, for his acceſſion to the rebellion 1715, was at the time of his forfeiture in poſſeſſion of the lands of Leuchars Forbes in the Shire of Fife. Theſe lands were ſeized and ſurveyed by the reſpondents, as forfeited by his attainder, and veſted in them for the uſe of the publick. By ſeveral acts of parliament, the mode of claiming any right of, into, or out of any of the eſtates of which any of the forfeiting perſons "was, were, or ſhould have been ſeiſed, or "poſſeſſed of, or intereſted in, or entitled unto, on the 24th "day of June 1715, or at any time afterwards in his, her, "or their own right, or to his, her, or their own uſe, or whereof "any other perſon or perſons was, were, or ſhould have been "ſeiſed, or poſſeſſed of, or intereſted in, to the uſe of, or in truſt "for them, or any of them, on the ſaid 24th day of June "1715, or at any time afterwards" was directed to be by entering a claim before the reſpondents within a time limited, and enlarged, by theſe acts. By the act 4 G. 1. c. 8. this time was finally enlarged till the 1ſt of June 1718. 4 G. 1. c. 8.

By a ſubſequent act, 5 G. 1. c. 22. upon a recital, that ſeveral doubts had ariſen in Scotland, as if the reſpondents had ſeized and ſurveyed certain eſtates, which were not veſted in his majeſty for the uſe of the publick; it was therefore enacted, that it ſhould and might be lawful for any perſon pretending right to ſuch eſtates, and that none of the forfeiting perſons were ſeiſed or poſſeſſed of, or intereſted in, or entitled unto ſuch eſtates in their own right, or to their own uſe, to exhibit their exceptions to the Court of Seſſion, ſetting forth their rights, within the time limited by the act, which the ſaid Court was directed to hear and determine, in manner pointed out by the ſaid act. 5 G. 1. c. 22.

Upon the footing of this act of parliament, the appellant preſented his exceptions before the Court of Seſſion, againſt the ſeizure and ſurvey of the ſaid lands of Leuchars Forbes: ſtating

That

That theſe lands were originally the undoubted property of Forbes of Reres, but he owing very great debts, the lands were adjudged by his creditors: that the creditors being very numerous a factor was appointed, and an action for determining the preferences of the ſeveral creditors carried on which was finiſhed in 1714; and afterwards the eſtate was expoſed to publick ſale before the Court of Seſſion, and the appellant as the higheſt bidder was declared the purchaſer, and obtained a decree of ſale in 1719:

That James late Earl of Southeſk having right to ſome debts charged upon the premiſes, and being cautioner for the factor, upon his death had got into poſſeſſion thereof, which he held at the time of his attainder; and the appellant, thereupon, claimed the eſtate to be decreed to him.

To theſe exceptions the reſpondents put in anſwers; and, after a hearing upon the queſtion, the Court of Seſſion, "ſuſtained the "appellant's right, and declared the eſtate in queſtion to belong "to him." But the reſpondents having brought their appeal from that, and many other of the like decrees then pronounced, to the Houſe of Lords; their lordſhips, in regard it did appear, and was admitted, *that the late earl was in poſſeſſion of the eſtate at the time of the treaſon committed*, declared void the ſaid decree of the Court of Seſſion, in reſpect they had no juriſdiction to judge upon ſuch exceptions.

After this the appellant applied by petition to the reſpondents, praying that they would hear and determine upon the matter of the appellant's exception and right to the ſaid lands; and the reſpondents upon conſidering the ſaid petition on the 10th of October 1720, refuſed the deſire thereof, in regard, the words of the ſaid act of the 5th of the King, were not ſufficient to warrant them to take on themſelves a juriſdiction, to hear and determine the merits of the appellant's right, no claim for the ſame having been entered in due time, according to the directions of the acts of parliament in that behalf. The appellant then tendered to the reſpondents an appeal, to be by them, together with the appellant's reaſons of appeal, tranſmitted to the Court of Delegates (*a*); but they refuſed the ſame, ſince their decree was only upon a petition, and not upon a claim duly given in.

The appellant thereupon applied by petition to the Court of Delegates, praying them to take his right under their conſideration and to hear and determine the ſame; and he enforced the prayer of his petition on this conſideration, that the foundation on which the reſpondents refuſed to tranſmit the appeal, (viz. becauſe he was not properly a claimant, and therefore that the judgment given upon his petition was not ſubject to the ſame rules, as judgments upon claims,) was the very matter in diſpute,

(*a*) By the act 4 G. 1. c. 8. power was given to his majeſty by commiſſion under the great ſeal of Great Britain, to appoint five of the Engliſh Judges to be a Court of Delegates, and of record in England; and five of the Scots Judges to be a Court of Delegates, and of record in Scotland, to hear and determine appeals from the deciſions of the commiſſioners for the forfeited eſtates.

and

and was properly to be determined by the ſaid Court. But the Court of Delegates, having adviſed this petition with anſwers made thereto for the reſpondents, on the 24th of January 1724, "refuſed the deſire of the petition; leaving the petitioner to "make his application in his circumſtantiate caſe for redreſs to "the proper powers."

The appeal was brought from "a ſentence or decree of the "Court of Delegates in Scotland, made the 24th of January "1724." Entered, 24 Feb. 1723-4.

Heads of the Appellant's Argument.

The act of the 5th of George the 1ſt, as it gives a power and liberty to every perſon, who pretends a right to the eſtates in queſtion, and that the forfeiting perſons were not ſeiſed, or poſſeſſed thereof, to preſent exceptions together with the grounds thereof, to the Court of Seſſion, with power to determine thereon; ſo if the caſe of the exceptant ſhould be ſuch as a claim might have been entered for before the reſpondents, or if it appeared that the forfeiting perſon was in poſſeſſion, &c., then the Court of Seſſion is diſcharged from determining thereupon, and *the ſame* is to be heard and determined by the truſtees in the manner directed by the act of the 4th of the king. By theſe words, *the ſame*, are meant, as the appellant conceives, the exceptions which the Court of Seſſion are not empowered to determine; and therefore this act gave the reſpondents a power to determine upon ſuch exceptions as were preſented to the ſaid Court of Seſſion, and of which that Court could not properly determine.

All penal laws are to be ſtrictly interpreted; and though any perſon claiming any intereſt out of a forfeited eſtate, was to enter a claim; yet that does not oblige the perſon who has a right to the eſtate itſelf, and to which he thinks the forfeiting perſon had no right, to enter any claim: for none of the words uſed in the act directing claims to be entered, import ſo much; and this is the appellant's caſe, who inſiſts on a title to the eſtate in queſtion, not under the forfeiting perſon, but as a *bonâ fide* purchaſer at a judicial ſale, paramount to him, and inſiſts that the forfeiting perſon though in poſſeſſion had no title at all.

The reſpondents cannot give themſelves any abſolute juriſdiction, when it is limited by law, and ſubjected to the review of a ſuperior court; and if they refuſe to tranſmit an appeal, the Court of Delegates may interpoſe and judge whether the refuſal is reaſonable; for otherwiſe, even in caſes where a claim was regularly entered, they might refuſe to tranſmit the appeal and ſo make the Court of Delegates quite uſeleſs; and therefore that Court muſt judge how reaſonably the reſpondents refuſed to tranſmit the appeal in this caſe. If the appellant has a right, it were hard, that he ſhould loſe his eſtate without any fault, or that the publick ſhould enjoy this eſtate without any right to it. What the appellant humbly deſires, is to have his right examined; if he had a right and was a purchaſer of that right for a valuable conſideration,

ſideration, it were hard to deprive him of the opportunity of having it enquired into, that his property may not be loſt.

Heads of the Reſpondents' Argument.

The reſpondents conceive, that it is unneceſſary for them to enter into the conſideration of the appellant's title, further than to ſay, that a decree of ſale pronounced by the Court of Seſſion, in February 1719, could not affect any forfeited eſtate. The appellant's pretended right, and the rights of the pretended creditors, in whoſe names the eſtate was decreed to be ſold are declared void by the expreſs words of the ſtatute 4 Geo., *becauſe no claim was entered for the ſame, within the times limited by that and ſubſequent ſtatutes.* Though they are a Court of record and have juriſdiction the ſame is limited to the particular matters mentioned in the ſtatute; that is, they have a power to determine claims upon forfeited eſtates, entered within the times limited by the ſeveral acts made in that behalf; but were not empowered by any act of parliament to receive, hear, or determine upon any claim, unleſs ſuch claim was entered before thoſe times, and the words of the act giving them juriſdiction are expreſs to this purpoſe. No clauſe in the act of the 5th of the king does enlarge the time for entering claims before them, nor does it extend their juriſdiction further, than as by the ſaid act of the 4th of the king: on the contrary it gives a part of the juriſdiction formerly in them to the Court of Seſſion, and leaves the other part of their juriſdiction in the ſame condition it was by the ſaid act of the 4th of the king.

By the ſame act of the 4th of the king, the determinations and decrees of the reſpondents were declared to be final and binding upon all parties concerned, except the claimant, or claimants, ſhould enter his, her, or their appeal againſt ſuch decree or determination, within 20 days after the ſame ſhould be made: and in caſe of ſuch appeals ſo entered, the commiſſioners and truſtees were required to tranſmit the ſame to the Court of Delegates in the manner by that act likewiſe directed; and the Court of Delegates were thereby empowered finally to hear and determine ſuch appeals. But this power given to the commiſſioners to review and tranſmit appeals, and to the delegates to determine thereon, was only upon claims entered in purſuance of ſome of the ſaid acts.

Judgment, 23 Jan. 1724-5. After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the decree or ſentence refuſing the petition of the appellant and therein complained of be affirmed.*

For Appellant, *Dun. Forbes. Will. Hamilton.*
For Reſpondents, *P. Yorke. Re. Dundas.*

Ex parte

Thomas Brand, of London, Goldſmith (*a*), *Appellant*; Caſe 115.
Sir Alexander Cumming, of Coulter, Bart. *Reſpondent.*

27 *Jan.* 1724-5.

Promiſſory Note.—It is objected to a promiſſory note, that it was not holograph, nor ſigned before witneſſes, and that therefore the ſigning and payment of the money ought to be proved: but it having been granted in London, the objections are repelled.

A partial payment was to be deducted, firſt out of the intereſt, and afterwards out of the capital. (Theſe before the appeal.)

Uſury.—Proceſs.—A defender having alleged uſury againſt a promiſſory note granted to the purſuer, the purſuer a goldſmith or banker in London, is ordered to confeſs or deny the facts, and a commiſſion is granted to Lord Chief Juſtice King, to take extracts from his books he reſiding in London.

Foreign.—A perſon reſiding in London, brings action on a promiſſory note in Scotland, againſt which uſury is pleaded; the clerk is ordered to retain the note in Court, till the purſuer ſhould transfer to his agent in Scotland, a collateral ſecurity in ſtock which had been granted by the defender.

ON the 20th of June 1720, the reſpondent then in London, granted to the appellant his promiſſory note for 3000*l.* mentioned to be for value received, payable one month after date; and he depoſited with the appellant, two receipts in the firſt ſubſcription then taken in by the South Sea Company for 500*l.* each. For theſe the appellant granted receipt in the following terms, "Received of Sir Alexander Cumming Baronet, two South Sea "firſt ſubſcriptions for 500*l.* each, which I promiſe to return on "payment of 3000*l.*, on or before the 20th of July next, and "in default thereof am empowered to ſell the ſame at market "price, and be accountable to him for the ſurplus, if any, the "firſt and ſecond payments being made thereon."

The appellant ſometime afterwards brought his action before the Court of Seſſion, againſt the reſpondent upon the ſaid promiſſory note, in which he ſtated, that at the requeſt of the reſpondent he had continued payment of ſaid note, firſt to the 25th of Auguſt, and then to the 25th of September following, having during that time received payment of 360*l.* part thereof; and that though the appellant ſeveral times preſſed the reſpondent, that he might be at liberty to ſell the ſaid two ſubſcription receipts, yet he declined to conſent thereto.

This cauſe coming to be heard before the Lord Ordinary, the reſpondent at firſt took an objection, that the note not being of his hand writing, nor ſigned before witneſſes, the appellant ought to prove the ſigning of the note, and payment of the money. The appellant anſwered, that the note being granted in London, and bearing to be for value received, the appellant was not obliged to prove the payment of the money nor the reſpondent's ſigning the

(*a*) The goldſmiths were at that period alſo frequently bankers, as the appellant appears to have been.

note,

note, unleſs he would deny, that he had ſigned it. The reſpondent having failed to confeſs or deny whether the note was granted in London, as directed by the Lord Ordinary, his Lordſhip on the 12th of July 1723, "repelled the nullity objected, "in reſpect of the anſwer, and held the reſpondent as confeſſed, "that the note was ſigned in England; and in reſpect the re- "ſpondent refuſed to prove his defence habilly, decerned con- "form to the concluſions of the libel."

Againſt this interlocutor the reſpondent preſented a repreſentation, inſiſting that the note was void, becauſe, as he ſtated, the appellant had taken more than legal intereſt, and at the rate of ſix per cent. per month. This the appellant denied, and the Lord Ordinary on the 30th of July 1723, "found that the "appellant having acknowledged that there was 360*l.* of the "ſum on the note paid by the reſpondent, the ſame was to be "deducted from the intereſt due on the ſaid note for the time, "and the remainder out of the capital; and before anſwer al- "lowed the reſpondent to prove *ſcripto* or by witneſſes, that at "granting the ſaid promiſſory note there was intereſt at the rate "of 6 *per cent.* for one month's forbearance, accumulated and "inſerted in the ſaid note, whereby the ſum in the note was "made 3000*l.*; and that thereafter, and for the two ſeveral and "ſubſequent months that the payment of the aforeſaid note was "continued, there was paid at each of the ſaid continuations a "premium or intereſt at the rate of 6 per cent for the month:" and granted a commiſſion for examining witneſſes, and allowed the reſpondent to prove *ſcripto* ſo far as he ſhould not prove by witneſſes.

Againſt this interlocutor a reclaiming petition was preſented for the reſpondent, and after various proceedings, the Court, on the 23d of January 1724, "ordained the appellant to confeſs or deny "how much of the ſum of 3000*l.* was delivered by the appellant to "the reſpondent, and whether upon the 20th of July and 25th of "Auguſt 1720, he received the ſum of 360*l.* in two moieties; and "directed the appellant's agent to declare what he knew in rela- "tion to theſe facts." And on the 7th of February thereafter, the Court, "ordained either party to give in condeſcendances of the "ſpecial facts alleged by either, and granted commiſſion to in- "ſpect the appellant's books, and take excerpts out thereof of "what may concern any of the points in the condeſcendances, "and tranſmit theſe excerpts with the report of the commiſſion," and alſo to take the depoſitions of witneſſes.

The reſpondent gave in a condeſcendance but the appellant reclaimed againſt the laſt interlocutor; and after anſwers the Court on the 20th of February 1724, "ſuſtained the promiſſory note "to be a good title of action; and before anſwer as to the other "points allowed a probation of the ſeveral facts in the reſpon- "dent's condeſcendances given in; and granted a commiſſion "to the Lord Chief Juſtice King, to examine witneſſes, and "make inſpection of the appellant's books, and take excerpts "therefrom of all ſuch facts as relate to the points contained in "the condeſcendance, reſerving to the Lords in caſe of the ap-

pellant's

" pellant's refuſing to produce his books, to conſider the import " thereof at adviſing the probation; and reſerving to themſelves " after probation, the conſideration whether or not, upon the " reſpondent's failing of payment upon the day, to which the " payment was laſt continued, the appellant was neceſſarily ob- " liged to ſell out at market price, the two South Sea ſubſcrip- " tions, depoſited in his hands, towards payment of the ſum for " which they were depoſited."

The reſpondent afterwards preſented a petition praying that the Court would ordain the clerk of the proceſs to keep in his cuſtody the promiſſory note granted to the appellant; and ordain the appellant to exhibit and produce in the clerk's hands, the two depoſited ſubſcriptions of 500*l.* each, or to transfer to the clerk ſuch ſtock as came in place thereof. After anſwers for the appellant, the Court on the 25th day of February 1724, " ordained " the appellant to transfer to John Hamilton his factor, this " ſtock which came in place of the ſubſcription, to be made forth- " coming, as the Lords in the event of the proceſs ſhould find " juſt; or otherwiſe to find caution to make the ſame forthcoming " betwixt and the ſaid day; and diſcharged the clerk to give up " the promiſſory note, until ſuch time as the depoſit was tranſ- " ferred, or caution found by the appellant as aforeſaid."

The appeal was brought from " ſeveral interlocutory ſentences " of the Lords of Seſſion of the 23d of January, 7th, 20th, and " 25th of February 1724." Entered, 14 March 1723-4.

Heads of the Appellant's Argument.

As the tranſactions in queſtion happened in England the appellant conceives, that the judgment of the Courts in Scotland, ought to be agreeable to the laws and cuſtoms of the place where the tranſaction was entered into.

He conceives further, that he was neither obliged by the laws of Scotland, nor of England, by himſelf, or his attorney or agent, to confeſs how much of the 3000*l.* was paid to the reſpondent, unleſs the reſpondent at ſame time offered that the note ſhould ſtand as a ſecurity for the money really advanced, and agreed to pay what was really lent, and to waive all penalties.

The examination and inſpection of the appellant's books, for which the commiſſion was granted, was to oblige him, if what the reſpondent ſtated were true, to produce evidence to convict him of uſury, by which he might be ſubjected to penalties in England, as well as to the loſs of a large ſum of money in Scotland, and this without directing any allowance to be made to him of the money that ſhould appear by the books to be inſpected, to be really and *bona fide* lent to the reſpondent. The appellant contends, that this part of the judgment is contrary to the known rules of proceedings in all Courts, and inconſiſtent with the common rules of juſtice.

The interlocutor of the 20th of Feburary, which grants a commiſſion, reſerves to the Court a power of determining whether the appellant was neceſſarily obliged to ſell the ſubſcriptions on the

reſpondent's failure to pay the money; but this leaves the whole cauſe as open and unſettled after the examination of witneſſes and production of books, as if no ſuch proceedings had been; ſo that all the expence and delay to be thereby incurred might be fruitleſs.

The enjoining the appellant to transfer the South Sea ſtock, ariſing from the two 500*l.* ſubſcriptions, (which covers but a ſmall part of the debt), or otherwiſe to find caution to put the ſame out of his own power; and the ordaining the clerk, not to give up to the appellant the promiſſory note entruſted in his hands, are apprehended to be very hard and unuſual. They tend to ſtrip the appellant of all means of ever obtaining ſatisfaction from the reſpondent, and make him quit the only ſecurity he has for payment of a ſmall part of the money due.

Judgment, 27 Jan. 1724-5. This day being appointed to hear counſel upon this petition and appeal, counſel accordingly were called in to be heard; and counſel appearing only for the appellant, proof was made of the due ſervice on the reſpondent's agent of the order for hearing the ſaid appeal; and thereupon the counſel for the appellants were heard, and due conſideration had of what was offered in relation to the cauſe.

It is ordered and adjudged that the ſaid petition and appeal be diſmiſſed, and that the ſeveral interlocutory ſentences therein complained of be affirmed.

For Appellant, *C. Talbot.* *Will. Hamilton.*

Caſes 116, 117, 118.

On three Appeals.

The Commiſſioners and Truſtees for the Forfeited Eſtates, - - - *Appellants*;

George Lockhart of Carnwath, Eſq; - *Reſpondent.*

6th *Feb.* 1724-5.

Preſumption-Evid—Bonds of penſion granted to an advocate, afterwards Preſident of the Seſſion, during his continuance to be an advocate, are ſued after his death by his ſon, as wholly remaining due, after the lapſe of ſo many years from their dates; and are ſuſtained till the date of the grantee's becoming Preſident of the Seſſion, his ſon giving his oath of credulity as to any payments made on the debts acclaimed.

Caſe of appeal.

ROBERT Earl of Southeſk, deceaſed, on the 28th of April 1674, granted a bond of penſion to Sir George Lockhart, the reſpondent's father, for the payment of 300 merks yearly to him, his heirs, executors, and aſſignees, during his continuance to be an advocate, by two half-yearly payments, the firſt commencing at Martinmas 1674.

The

The reſpondent's father continued to practiſe as an advocate, the 1ſt of January 1686, when he was made Lord Preſident the Seſſion. He died in 1689, leaving the reſpondent, his ı, about eight years of age; the reſpondent was confirmed exe-:or to his father, by the commiſſaries of Edinburgh, on the d of January 1690.

After the attainder of James late Earl of Southeſk, and ſeizure his eſtate real and perſonal by the appellants, the reſpondent ered his claim before them on the ſaid bond, for the ſaid ſum 3co merks yearly from Martinmas 1674 to January 1686.

This claim came to be heard before the appellants, on the of September 1719, when they were pleaſed to diſallow and niſs the ſame.

The appellant thereupon appealed to the Court of Delegates, o, after hearing counſel for both parties, on the 3d of March 24 "reverſed the decree of the ſaid commiſſioners, with this quality, that the reſpondent do make up proper titles in his perſon to the ſaid debt, before he receive debentures from the appellants, and alſo give his oath of credulity as to any payment made of the debt acclaimed, and reſtrict the ſaid claim to the time till the ſaid Sir George Lockhart was made preſident of the Seſſion."

The firſt appeal was brought from "a decree of the Court of Delegates in Scotland, made the 3d of March 1724." Entered, 23 March 1723-4.

An appeal, of a nature preciſely ſimilar, was at ſame time eſented by the appellants on the following caſe: 2d appeal.

George Earl of Mariſchal, deceaſed, on the 10th day of March 73, executed a bond to the ſaid Sir George Lockhart, reciting, it he having many experiences of the ſound and wholeſome vices and good ſervices done to him by his truſty and faithful end Sir George Lockhart, advocate, his ordinary advocate and inſellor, in his affairs and buſineſs at law; and being very ſenle of the trouble and pains he was put to therein, and being deous in ſome meaſure to remunerate his kindneſs, and truſting would continue the ſame towards him, therefore he obliged him-f to pay to the ſaid Sir George Lockhart, his heirs, executors, aſſignees, the ſum of 400 merks Scots money, in name of pen-ı, yearly, in time coming during the ſaid Sir George's continu-: to be an advocate.

A claim, ſimilar to that in the firſt appeal, was entered by the pondent, on the forfeited eſtate of the Earl of Mariſchal, on ount of this bond, which, on the 16th of September 1720, s diſallowed by the appellants; but, upon an appeal, the Court Delegates, on the 3d of March 1724, reverſed the judgment the appellants, and decided as in the firſt appeal.

The ſecond appeal was brought from "a decree of the Court of Delegates in Scotland, made the 3d of March 1724." Entered, 25 March 1723-4.

The appellants alſo preſented a third appeal, on the following : : 3d appeal.

Alexander, late Earl of Linlithgow and Callender, deceaſed, the 11th of February 1676, executed a bond for paying to the

ſaid Sir George Lockart, during all the days of his lifetime, at leaſt during his continuing to be employed in his affairs, and until the ſaid penſion ſhould be recalled and diſcharged, the ſum of 400 merks Scots yearly.

The reſpondent made a claim ſimilar to the two former on the forfeited eſtate of the Earl of Linlithgow and Callender, on account of the laſt mentioned bond; but his claim was diſmiſſed by the appellants on the 20th of Auguſt 1720. He brought his appeal to the Court of Delegates, who, on the ſaid 3d of March 1724, reverſed the judgment of the appellants, and decided as in the two former appeals.

Entered, 23 March 1723-4.

The third appeal alſo was brought from "a decree of the Court "of Delegates in Scotland, made the 3d of March 1724."

Heads of the Appellants' Argument.

The decrees of the Court of Delegates are founded on a ſuppoſition, that the annual penſions are in arrear, and unpaid, from the time of granting the reſpective bonds; and, that no part was ever paid to Sir George Lockhart, which is conceived to be incredible.

For theſe bonds have never been put in ſuit, nor has any diligence been done for non-payment of the ſaid yearly penſions; neither by the reſpondent's father, nor his tutors or curators, during his minority, nor by himſelf ſince he came of age, except entering the aforeſaid claims; and no proof was offered, or brought, of any ſervice performed by the ſaid Sir George Lockhart, to any of the ſaid earls, who granted the bonds claimed, nor of any arrear reſting in reſpect thereof, though the condition of granting one of theſe bonds was expreſſed to be for ſervices to be done; and the Earl of Callender, grantor of one of the bonds, died long before the reſpondent's father. Such penſions are in uſe to be paid annually, though it be impoſſible in the preſent caſe to recover the releaſes of ſuch annual payments. Beſides, when the reſpondent, or his tutors, made up titles in his perſon to the perſonal eſtate left by his father, no notice was taken of the ſums now claimed.

Heads of the Reſpondent's Argument.

As the bonds in queſtion are admitted to be regularly executed, they are not to be taken away by preſumptions of any kind. If a bond is not ſued for in 40 years after its date, it is then barred by the ſtatute of limitations in Scotland; but if any action is commenced in that time, nothing can take away the bond but an actual proof of payment; for as the obligee is not obliged to ſue, his having the original bond in his poſſeſſion, is a preſumption of non payment; and if ſuch action be commenced in 40 years, the obligee will be entitled to recover payment.

It is true, the earlieſt of theſe bonds was executed in 1673, and the laſt yearly ſums payable upon all of them became due in 1686; but the reſpondent was 12 years of the time a minor, and

1617. c. 12. it is expreſsly provided by act of parliament 1617, c. 12. "That "in

" in the courſe of the ſaid 40 years' preſcription the years of " minority and leſſe age ſhall no ways be counted, but only the " years during the which the parties againſt whom the preſcrip- " tion is uſed and objected were majors, and paſt 21 years " of age."

The reſpondent's claim was entered in 1718, not quite 19 years after the laſt payments became due on the bonds, including the years of the reſpondent's minority, nor above 33 years from the date of the oldeſt bond, excluſive of his minority.

There is no neceſſity for the reſpondent's proving, that his father rendered any ſervice as an advocate to the late Earl of Southeſk. Bonds of this kind are given merely as retaining fees, and are payable whether any ſervice be done or not. The recital of this bond is for *certain good deeds done and performed, and to be done and performed*, and the penſion thereby granted is payable to Sir George Lockhart, his heirs, executors, and aſſignees, *during his continuing to be an advocate*; which plainly ſhews, that any proof of ſervice rendered was not neceſſary; and, indeed, in the nature of this caſe, ſuch proof cannot be had.

Such penſions are ſeldom or never paid annually; on the contrary, they are frequently and uſually left unpaid for a great many years together. In the caſe Mrs. Black and Sir Peter Fraſer, upon an appeal, it was determined that the penſion ſhould be paid though a great many years in arrear. No. 47. of this Collection.

It is of no moment that diſcharges cannot now be eaſily recovered, for that will be an argument againſt all debts that are bred at any diſtance of time: and, on the contrary, it is to be preſumed, that the obligee having the bond, the debt is not ſatisfied unleſs diſcharges are produced.

After hearing counſel on the firſt appeal, *It is ordered and adjudged, that the ſame be diſmiſſed; and that the decree therein complained of, with reſpect to the bond claimed by the reſpondent, alleged to have been given to Sir George Lockhart, his father, by Robert late Earl of Southeſk, be affirmed.* Judgment, 6 Feb. 1724-5.

A ſimilar judgment was ſeparately pronounced, of ſame date, in the two other appeals.

For Appellants, *P. York.* *C. Wearg.*
For Reſpondent, *C. Talbot.* *Will. Hamilton.*

Caſe 119. The Commiſſioners and Truſtees of the Forfeited Eſtates, - - - *Appellants;*
Elizabeth Stevenſon, Widow of Archibald Pitcairn of that Ilk, Doctor of Medicine, *Reſpondent.*

13th *Feb.* 1724-5.

Treaſon—Obligations granted in Priſon before Trial.—The Earl of Winton, while in priſon previous to his trial and attainder for high treaſon, granted receipts bearing to be for money advanced to him, but theſe are not allowed in whole.

It is found, however, that he was entitled to be alimented out of his eſtate at that period, and to apply money to the expences of his trial, and for his maintenance in priſon for three months; and for ſuch expences a ſum of money (2972*l.* 3*s.*) is modified.

GEORGE, late Earl of Winton, was taken priſoner, among the rebels, at Preſton, on the 13th of November 1715; and committed to the Tower on the 10th of December following. Upon the 21ſt of January 1716, the earl, while in confinement in the Tower, granted a factory to the reſpondent for levying the rents of his eſtate; in virtue of which ſhe, according to her own acknowledgment, received to the amount of 1135*l.* 5*s.* 10*d.* ſterling. The earl alſo delivered to the reſpondent two receipts for money, the one for 1000*l.* bearing date the 6th of February, and the other for 4000*l.* bearing date the 16th of ſame month; and obliged himſelf to allow thoſe ſums to the reſpondent at compting. He was afterwards attainted of high treaſon, upon an impeachment before the Lords in Parliament, and his eſtate was veſted in the appellants for the uſe of the public.

The reſpondent afterwards entered a claim as a lawful creditor before the appellants, in terms of the act 1 G. 1. "appointing commiſſioners to inquire," &c., charging herſelf with the ſaid ſum of 1135*l.* 5*s.* 10*d.* as received of the rents of the Earl of Winton's eſtate, and claiming the ſum of 3879*l.* 14*s.* 2*d.* as the balance remaining due upon the ſaid receipts of caſh advanced by her to the earl. This claim being heard before the appellants, they, on the 17th of Semptember 1719, "Found that the ſaid "receipts or bills were given to the reſpondent by the late Earl "of Winton, after the articles of impeachment were exhibited "againſt him, and during the time of his trial, whereon he was "convicted and attainted, and no proof offered of the valuable "conſideration; and therefore diſmiſſed the ſaid claim."

The reſpondent preſented her appeal to the Court of Delegates againſt this judgment of the appellants; and, after a hearing of the cauſe, the Delegates, on the 1ſt of March 1723, "Reversed "the judgment of the appellants, and found that the ſaid late "earl was, during the time of his impriſonment at London, &c. "titled to be maintained and ſupplied out of his means and eſtate "for

" forfeited, in ſo far as was neceſſary for his ſaid maintenance " and defence in the criminal proſecution for high treaſon car- " ried on againſt him; and remitted the reſpondent's claim to " the appellants in order to take further evidence of the reſpon- " dent's having advanced money to the ſaid late earl, and to con- " ſider what ſum or ſums of money ſhould be modified as the " neceſſary maintenance and ſupply of the ſaid late earl, during " his ſaid impriſonment and criminal proſecution aforeſaid; and " in ſo far as they ſhould find the ſame equitable, to ſtate that " ſum as a debt upon the means and eſtate of the ſaid late earl " attainted."

The reſpondent now brought evidence on her part of the furniſhings to the earl, and the appellants, upon conſidering the ſame, on the 14th of October 1723, " Found that the reſpon- " dent did, during the impriſonment of and criminal proſecution " againſt the ſaid late Earl of Winton, remit and pay to his uſe " ſeveral ſums of money; but that the ſum of 2059*l.* 1*s.* 8*d.* " ſterling was ſufficient for his neceſſary maintenance during " ſuch his impriſonment, and for his defence in the ſaid criminal " proſecution for high treaſon carried on againſt him; and as it " appeared to them that the Lords Delegates by their decree, " dated the 14th of December 1722, made upon the appeal of " Charles Menzies, the ſaid late earl's ſolicitor in parliament, " againſt a decree of the appellants, which they thereby re- " verſed, had found the ſaid Charles Menzies a juſt and lawful " creditor on the ſaid eſtate for the ſum of 216*l.* 3*s.* ſterling; " and that the reſpondent by her ſaid claim had acknowledged " the receipt of 1135*l.* 5*s.* 10*d.* ſterling, after deduction of her " charges, and exchange of remittances, which ſums of 216*l.* 3*s.* " and 1135*l.* 5*s.* 10*d.* they decreed to be deducted out of the " ſaid ſum of 2059*l.* 1*s.* 8*d.*, which reduced the ſame to " 707*l.* 12*s.* 10*d.* which they decreed to the reſpondent in full " of her ſaid claim, and of all demands ſhe had againſt the ſaid " late earl's eſtate."

The reſpondent preſented a ſecond appeal to the Court of Delegates; and after ſundry proceedings, they, on the 9th of March 1724, " Found that to the ſum of 707*l.* 12*s.* 10*d.* of balance " found due to the reſpondent, there be added the ſum of 913*l.* " 1*s.* 4*d.* in lieu of her expences on the ſaid late earl's trial, and " maintenance whilſt in priſon, both which ſums extended to " 1620*l.* 14*s.* 2*d.* ſterling; and found that this ſum of 1620*l.* " 14*s.* 2*d.* is to bear intereſt from the 2d day of Auguſt 1716; " and remitted to the reſpondents to iſſue debentures ac- " cordingly."

The appeal was brought from " a decree of the Court of De- " legates in Scotland of the 9th of March 1724." Entered, 25 March 1724.

Heads of the Appellants' Argument.

By the decree of the Delegates the Earl of Winton's eſtate is charged, to the prejudice of the public, with no leſs than 2972*l.* 3*s.* ſterling for his maintenance in priſon for three months, and

the expences of his trial, without any evidence that any ſuch ſum was applied in that way: and the appellants conceive, that the ſum of 2059*l.* taxed by them, was more than ſufficient for theſe purpoſes.

The Court of Delegates has decreed to the reſpondent the ſum of 2756*l.* counting what ſhe levied out of the eſtate; whereas by her own evidence, lame as it is, no more appears to have been advanced by her to the earl than the ſum of 1312*l.*

It does not appear, that the money in queſtion was advanced for the earl's maintenance before his attainder, or his defence on his trial; but from the circumſtances of the caſe, it is more probable, that it was taken up by him to bring about his eſcape, and to ſupport him abroad after his attainder.

The real eſtate of the forfeiting perſon is by act of parliament veſted in his majeſty from the 24th day of June 1715; and the power given by that act of entering claims to charge ſuch real eſtate, is only for rights, debts, or incumbrances affecting the ſame, before the day whereon it is veſted in his majeſty: but the debt claimed in this caſe, is not pretended to have been incurred till ſeveral months after that day.

Heads of the Reſpondent's Argument.

The appellants admitting that the late earl was entitled to be ſupplied out of his eſtate during his impriſonment, ſo far as was neceſſary for his maintenance and defence, it is not material that the ſaid receipts bear date after the 24th of June 1715, from which period the eſtate was to be veſted in his majeſty, or the 13th of November 1715, from which period the earl was to ſtand attainted. It appears by ſufficient evidence, that the ſaid receipts were executed by the earl, before his attainder, at the times they reſpectively bear date.

The reſpondent has brought as ſufficient evidence, as the nature and circumſtances of this affair would admit of, that ſhe really and truly advanced more money than is decreed to her; and her evidence was ſuch as fully to ſatisfy the Court of Delegates. And ſince the earl's maintenance and expences of his trial muſt have amounted to a very conſiderable ſum, and as the remittances are proved to have been made to him on that account by the reſpondent only; there can be no doubt but that the money was truly applied to that uſe.

The reſpondent, alſo, having advanced all the ſaid money claimed by her in the beginning of the year 1716, and being herſelf obliged to pay intereſt for what ſhe ſtill ſtands indebted, there was juſt ground for the Court of Delegates giving her intereſt for what ſhe ſo advanced.

Judgment, 13 Feb. 1724-5. After hearing counſel, *It is ordered and adjudged, that the decree of the Court of Delegates complained of in the appeal, whereby the ſaid Court found and adjudged, that the ſum of* 913*l.* 1*s.* 4*d. ſterling ſhould be added to the ſum of* 707*l.* 12*s.* 10*d. ſterling, decreed to the reſpondent by the appellants the ſaid* 14*th day of October* 1723, *be reverſed; and that the ſaid judgment and decree*

given

given by the appellants, allowing the said 707*l.* 12*s.* 10*d. be affirmed.*

For Appellants, *P. Yorke. Ro. Dundas.*
For Reſpondent, *Will. Fraſer. C. Talbot.*

The Governor and Company of Undertakers for raiſing Thames Water in York Buildings, - - - *Appellants;*
John Haldane, Eſq; - - *Reſpondent.*

Caſe 120. Edgar, 29 Dec. 1724.

14th *April* 1725.

Juriſdiction.—The York Buildings Company, which had purchaſed large eſtates in Scotland, was liable to be ſued in that country, in a perſonal action relative to a tranſfer of ſtock, though ſuch tranſfer could only be made in London.

IN February 1724, the reſpondent brought an action againſt the appellants before the Court of Seſſion, ſetting forth, that in the month of June 1720, the reſpondent having occaſion for money at London, borrowed 3000*l.* ſterling from the appellants, and as a ſecurity for re-payment of the ſame, cauſed one Gibſon, who held ſtock in his name in truſt for the reſpondent, to tranſfer 6000*l.* of the appellants' capital ſtock, into the hands of the appellants, purſuant to their public advertiſements at that time for lending of money for a month;

That the reſpondent being obliged to go to Scotland before the 21ſt of July, the day when the 3000*l.* became payable, made a propoſal to the appellants to pay the ſame to their agents in Scotland, the 6000*l.* ſtock being to be retranſferred to his truſtee by the appellants; which being agreed to, a bill was drawn on the reſpondent, dated 21ſt July 1720. for 3147*l.* 18*s.* 10*d.* payable to the appellants' agents at 14 days' ſight, which the reſpondent accepted on the 27th of July at Edinburgh, and duly paid on the 10th of Auguſt following:

That this payment being made, and the conditions on the reſpondent's part fully performed, upon the faith and belief that the 6000*l.* ſtock, pledged with the appellants, was by them retranſferred to him or his truſtee; the reſpondent conceived that he had no more to do, but to order the ſame to be ſold as his occaſions required; but inſtead thereof, and when the reſpondent ordered the ſame to be ſold at 150 *per cent.* (which price that ſtock yielded after the ſaid 10th of Auguſt) he found no ſtock in his or his ſaid agent's name, in the appellant's books; but that the ſame was diſpoſed of to the uſe of the appellants:

That after many fruitleſs applications on the reſpondent's part, to have juſtice done him in an amicable way, he was at laſt obliged

obliged to bring the preſent action: and he concluded, that the appellants ought to be found liable to pay 9000*l.* to the reſpondent, being the value which the ſaid 6000*l.* capital ſtock would have yielded, had juſtice been timeouſly done to him in retranſferring the ſaid pledge, and if the ſame had been ſold as he intended and directed.

The appellants ſtate, that though they had a very good and proper defence againſt the ſaid demand, had it been thought adviſeable to enter into the merits of the cauſe in the Court of Seſſion; yet they, conceiving that an action of this nature could not be brought againſt them in the ſaid Court, gave in a declinature of the juriſdiction; and inſiſted that the appellants did not reſide within the juriſdiction of that Court, but had their reſidence at London, and were thereby ſubject to the Engliſh courts; and that if the reſpondent had any demand againſt them, he muſt ſue them in England; eſpecially ſince the demand in the preſent caſe was for an account of the transfers of their ſtock.

In anſwer the reſpondent contended, that the appellants were capable of acting in Scotland; that they had purchaſed conſiderable eſtates there; and ſo were ſubject to the juriſdiction of the Scotch courts.

This cauſe being heard before the Lord Ordinary on the 16th of July 1724, his lordſhip, by interlocutor of that date, took it to report to the whole Court. Having reported the ſame accordingly, the Court, after adviſing mutual informations for the parties, on the 29th of December 1724, "Suſtained proceſs at "the reſpondent's inſtance againſt the appellants." And upon adviſing a reclaiming petition preſented by the appellants, the Court, on the 16th of January 1725, "refuſed the deſire of the "petition, and adhered to their former interlocutor."

Entered, 5 Feb. 1724-5.

The appeal was brought from "two interlocutory ſentences of "the Lords of Seſſion, made the 29th of December 1724 and "16th of January 1725."

Heads of the Appellants' Argument.

This action was not proper to be ſued againſt the appellants in the Court of Seſſion, the appellants being a body corporate, and ſubſiſting in England, whereby they were ſubject to another juriſdiction; and this the more eſpecially ſince the reſpondent makes his own caſe to be that the money was borrowed at London; and that the ſecurity given was by a transfer of ſtock in the books of the York Buildings Company, which are kept at London, and, by the conſtitution of the company, are neceſſarily kept there. The preſent demand of the appellant is not relating to any eſtate or effects belonging to the appellants in Scotland, nor an action immediately to affect, by way of execution, any ſuch eſtate; but merely a perſonal action for conſtituting a debt alleged to ariſe from a complicated tranſaction in another country: and the appellants conceive that ſuch action ought regularly to be ſued before the judge of the place of their reſidence, or where the cauſe of action ariſes.

Though the company have agents in Scotland for their lands there, yet they have no office in that country for transferring ſtocks, about which the preſent queſtion is; nor can they do any act in Scotland in relation to ſtock. The company having purchaſed eſtates in Scotland no doubt ſubjects them to the juriſdiction of the courts there in all actions relating to theſe eſtates; but not to any perſonal demand againſt them, eſpecially ſuch as the preſent caſe. Where a debt is liquidated againſt the appellants, they may be ſued in Scotland, ſo as to make that debt a charge upon their lands in that country; becauſe an eſtate cannot be charged but by ſome juriſdiction to which it is ſubject; yet the preſent caſe is very different, for it is to commence a perſonal action to have the appellants found liable in a debt, which has not hitherto in any manner been eſtabliſhed.

The incorporation of the York Buildings Company, and the directions relative to the management of their affairs, are by act of parliament; and they are limited to meet and tranſact their buſineſs in or near York Buildings: and though, under the ſanction and encouragement of divers acts of parliament, they have become purchaſers of the greateſt part of the forfeited eſtates in North Britain, by which the public has received great benefit; yet if it could have been apprehended, that ſuch purchaſes in that part of the kingdom, would have ſubjected their tranſactions at London, relating to loans of money and transfers of ſtock, to ſuits and actions in the courts of judicature in Scotland to be commenced there by any one at pleaſure, the appellants conceive that it cannot be reaſonably ſuppoſed, that they, or any other corporation in South Britain, would have engaged in any ſuch purchaſes.

But ſince the courts in England are open, ſince the tranſaction was in England, and the reſpondent now reſides there, if he have any juſt demand, no doubt he will procure ſatisfaction in the courts in *Weſtminſter-hall*; and the appellants ſubmit to anſwer any demand he has againſt them in any of thoſe courts: but they hope that they ſhall not be obliged to anſwer in Scotland for tranſactions concerning transfers of ſtock at London.

Heads of the Reſpondent's Argument.

Though the appellants have their chief reſidence in England, yet they are proprietors of a very great landed eſtate in Scotland; in virtue whereof, they are ſubjects and vaſſals of the crown of Scotland, and, as ſuch, liable to all the conſequences in point of juriſdiction, that attend ſuch vaſſalage. By the conſtitution of Scotland, all the vaſſals of the crown are liable to give ſuit and preſence to the king in his courts, either by themſelves perſonally, or by their attornies; and to anſwer to ſuch matters and things as lawfully can be charged upon or brought againſt them. Though ſuch vaſſal may happen in fact to be out of the realm, yet he is underſtood in the eye of the law, to have left

left his procurator or attorney within Scotland: and hence it is, that though a vaſſal be actually abſent from the realm, he is amenable to the king's courts by a particular ſummons at the market-croſs of Edinburgh and pier and ſhore of Leith, as much as if he were at the time preſent within the kingdom.

If the appellants admit, as needs they muſt, that though abſent from Scotland, they are as much ſubject to the ſummons of the king's courts there, as if they were actually preſent, becauſe they are vaſſals to the crown in that kingdom; then the diſtinction betwixt real and perſonal actions is vain; becauſe, being ſubject to the juriſdiction, and actually ſiſted in judgment in a legal way, they cannot refuſe to plead to any juſt demand that is brought againſt them: nor is it poſſible to affect their real eſtate, which they admit ought to be affected, for their debts, until the debt be eſtabliſhed by a perſonal action in the courts in Scotland. For, though the debt in queſtion were conſtituted and eſtabliſhed by a judgment of any of the king's courts in England, that judgment could not legally produce any execution againſt the real eſtate of the appellants in Scotland; nor could their real eſtate there be affected in conſequence of that judgment, without previouſly recovering a freſh decree of conſtitution in Scotland upon a ſummons, ſuch as is the foundation of the preſent ſuit.

Nor will the ſuing the appellants in Scotland put them under the neceſſity of tranſporting their books, minutes, officers neceſſary to give evidence, and accounts into that country; for, by the courſe of proceeding in the Court of Seſſion, witneſſes may be and are daily examined by commiſſion in England, and extracts and abſtracts of books are taken.

Judgment, 24 April 1725. After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutors therein complained of be affirmed.*

For Appellants, *P. Yorke.* *C. Wearg.*
For Reſpondent, *Dun. Forbes.* *C. Talbot.*

William Duff of Braco, Mr. Leſlie of Melroſe, and Others, - - - *Appellants*;

The Right Honourable David Earl of Buchan, - - - - - - *Reſpondent.*

Caſe 121.

15th *April* 1725.

Reduction Improbation.—Union.—The defenders in a reduction improbation having objected to the purſuer's infeftment, which was taken at the Caſtle of Banff, by diſpenſation in a charter of 1625, that by a poſterior charter that caſtle was disjoined from the barony; the Court found that objection not relevant to hinder the taking of terms for production, reſerving this matter after production: but their judgment is reverſed.

The defenders made another objection, that the purſuer claimed under a charter to heirs male, whereas a ſubſequent charter, as they offered to prove, had been granted to heirs general. The Court gave the ſame judgment on this objection as on the former, but their judgment is alſo reverſed:

And it is ordered, that in the further progreſs of the cauſe the Court do not oblige the appellants to take a term for production until the purſuer make out his title upon which he founds his ſuit.

Saſine.—The Court having repelled an objection made to a ſaſine written throughways, that the witneſſes had only ſigned the laſt page; the judgment is reverſed.

IN 1722 the reſpondent brought an action againſt the appellants, before the Court of Seſſion, of reduction improbation, and declarator of the titles by which the appellants held certain lands, the fee of which the reſpondent claimed as veſted in him. In this action the reſpondent ſtated, that in 1625, upon the reſignation of Mary Counteſs of Buchan, and James Areſkine, ſon of John Earl of Mar, her huſband, a charter from the crown was granted to them of the eſtate of the family of Buchan, in life-rent, and to James Lord Auchterhouſe, their ſon, and the heirs male of his body, whom failing to the heirs male of their marriage, whom failing to the heirs male of the ſaid James Areſkine the huſband:

That James Lord Auchterhouſe, then Earl of Buchan, when he ſucceeded to the eſtate, charged the ſame with ſeveral wadſets, granted divers truſt-rights, and having contracted debts, his creditors obtained appriſings of great part of his eſtate for ſmall and inconſiderable ſums: and that the creditors, and others, having or pretending to have rights upon the ſaid eſtate, entered into poſſeſſion of a great part of it, and taking advantage of the difficulties in which the family was involved, continued in poſſeſſion, though their debts were conſiderably overpaid by receipt of the rents and profits:

That this James Earl of Buchan died in 1664, and none of the heirs of the family made up titles to the eſtate, till it had devolved upon the reſpondent, and after the act 1695, c. 24. had been paſſed, allowing heirs to enter *cum beneficio inventarii*, but that the reſpondent having been beyond ſeas when the ſucceſſion devolved

devolved upon him, and the *annus deliberandi* having expi
fore his return, he in 1705 applied for and obtained an
parliament, allowing him to ſerve himſelf heir male *cum*
inventarii to his predeceſſor laſt infeft: and thereupon h
on the 27th of Auguſt 1706, duly ſerved heir male to t
James Lord Auchterhouſe, afterwards Earl of Buchan, w
in 1664, *cum beneficio inventarii*; and that in virtue of t
vice the reſpondent took infeftment at the Caſtle of Ba
virtue of a diſpenſation contained in the ſaid charter 1625
the lands contained in that charter: and, in ſupport of his
the reſpondent produced the retour of his ſervice, and the
ment of ſaſine taken thereafter in his favour.

The appellants at firſt contended, in this action, that t
produced by the reſpondent was not ſufficient to entitle
maintain the action, but that he ſhould alſo produce t
charter 1625, under which he claimed, together with the
parliament allowing him to ſerve heir *cum beneficio in*
The Lord Ordinary, on the 8th of January 1724, "Repe
"objection and ſuſtained the reſpondent's title:" and to thi
locutor his lordſhip adhered on the 28th of January and
February following. The appellants having, however, o
a ſtay of proceedings, on the 23d of June 1724, they w
dered to proceed in the cauſe.

They now brought forward two objections to the inſtru
ſaſine, that the witneſſes had only ſigned the laſt pag
that it was therefore void: and that it was alſo void, havi
taken at the Caſtle of Banff, which was no part of the ear
Buchan, nor of the lands claimed by the reſpondent; for
the caſtle in 1625 was part of the earldom, and ſaſine t
the caſtle was then ſufficient, yet it had been conveyed
James (under whom the reſpondent claimed) to one Sha
in 1662 had procured a crown charter of the Caſtle of B
certain lands to him and his heirs, and who had ever ſince
poſſeſſion of the premiſes: they objected further that
ſpondent could have no title under the ſaid charter 1
which, he ſtated, the eſtate had been limited to the heirs
James Earl of Buchan, formerly James Lord Auchterho
that by this charter a power was reſerved to James Areſk
father of Lord Auchterhouſe, to ſell all or any part of
eſtate; and he, in 1636, conveyed all his eſtate to tru
payment of debts, upon which they were duly infeft:
after this James the father's death, the truſtees entered
contract with James then Earl of Buchan, formerly Lor
terhouſe, for a reconveyance of the eſtate; and according
the marriage of this Earl James, a procuratory of reſigna
executed by the truſtees with his conſent, upon which
charter was obtained in 1652, ſettling the ſaid lands an
to the ſaid James Earl of Buchan, and the heirs male of
marriage, whom failing to the heirs male of his body of a
marriage, whom failing to the heirs female of his bod
which charter ſaſine was duly taken and recorded; of whic

the appellants produced a copy: and that this Earl James ſold various parts of the eſtate, and the appellants poſſeſſed under titles which had not been challenged for 70 years, ſome parts of the lands having in that period been ſold five or ſix times over.

The reſpondent made anſwers upon theſe points, and the Lord Ordinary, on the 28th of November 1724, "Found the "objection againſt the reſpondent's title, that though ſaſine is "taken at the Caſtle of Banff, by virtue of a diſpenſation in his "predeceſſor's charter, yet by a charter of a poſterior date, and "before his taking of the ſaſine, the ſaid Caſtle of Banff was diſ-"joined from the barony, not competent in this ſtate of the "proceſs to hinder the taking of terms, reſerving to the appel-"lants to be heard thereupon after the production is ſatisfied; "and repelled the objection that by a charter poſterior to that "whereby the eſtate ſtands provided to heirs male, the deſtina-"tion of ſucceſſion was altered to heirs female, reſerving to the "appellants to be heard thereupon after production, in caſe it "ſhall then appear, that their rights flow from theſe heirs female; "and repelled the objection formerly taken to aviſandum that "each page of the ſaſine is not ſigned by the witneſſes but only "the laſt." The appellants having reclaimed, the Court, on the 5th and 15th of January 1725, adhered to the ſaid interlocutor of the Lord Ordinary, and aſſigned a term for production.

The appeal was brought from "ſeveral interlocutory ſentences "of the Lords of Seſſion of the 8th and 28th of January, and "4th of February, the 23d of June and 28th of November 1724, "and the 5th and 15th of January thereafter." Entered, 28 Jan. 1724-5.

Heads of the Appellant's Argument.

When objections were made to the reſpondent's title, a ſuppoſition that ſuch title might be good was not a ſufficient reaſon to decree the appellants to produce the ſeveral titles under which they claimed: it would, in their opinion, have been much more juſt, to have conſidered the objections made to the reſpondent's title in the firſt place; for if upon theſe points judgment were given for the appellants, there would be an end of this ſuit. To what purpoſe would it be for the appellants to enter into an expenſive ſuit, and produce their title deeds, when it plainly appears from the charter 1652, which the appellants inſiſted upon, that the reſpondent, the purſuer in the Court below, has no title at all? That queſtion ought therefore to have been determined firſt.

The Court of Seſſion were ſo far of opinion, that the objections to the reſpondent's title were of weight, that they have reſerved to the appellants the benefit of being heard upon them after the production is ſatisfied; but the appellants conceive that ſince the reſpondent is attempting as heir *cum beneficio inventarii*, upon a charter granted 100 years ſince, to diſturb the poſſeſſion of purchaſers for full and valuable conſiderations, and who have been in quiet poſſeſſion for 70 years, great care ought to have been taken, that the title under which the reſpondent claims ſhould be produced,

produced, and appear clear and ſubject to no exception before purchaſers ſhould be obliged to produce their title deeds.

The argument againſt the reſpondent's ſaſine is a plain bar to the action, and puts an end to the cauſe: when that matter was fully laid before the Court, it ought to have been determined before any further proceedings were had, becauſe, if well founded, it overturned the reſpondent's title.

If the eſtate in queſtion be limited to the heirs general of Earl James, under whom the reſpondent claims, which the appellants offered to prove, the reſpondent has no intereſt, as he claims in the character of heir male. The right under which the reſpondent claims was cut off by the limitation to the heirs general contained in the charter 1652, none of whom are parties to this action. After the preſent action is diſpoſed of, the appellants may be ſued in another action by the heirs general; whereas all thoſe inconveniences would have been obviated had the judges obliged the reſpondent to make out his title in the firſt place.

An action of a ſimilar kind with the preſent was brought by the Earl of Caithneſs againſt the Earl of Breadalbane and others; in which the defenders made ſeveral objections to the then purſuer's title: the judges, without determining thoſe points, directed the defenders to produce their title deeds, reſerving to them, as in this caſe, the benefit of their objections after production: but upon appeal, this Houſe "reverſed the interlocu-
30 March 1723-4. "tors complained of, and ordered that the Lords of Seſſion, "upon the further progreſs of the cauſe, ſhould not oblige the "appellants to take a further term for production, until the "reſpondent ſhould have made out his title, upon which he "founded his ſuit."

Heads of the Reſpondent's Argument.

Though the act of parliament, allowing ſaſines to be written bookways, founded on by the appellants, contains the proviſo that the witneſſes ſhould ſign every page; yet by a poſterior act 1696, c. 15., it is enacted, that where any ſecurity or title deed is written bookways, it ſhall be ſigned by the witneſſes on the laſt page only; and the reſpondent's ſaſine being a ſecurity, and ſigned according to the directions of the latter ſtatute, the notary having ſigned each page, and the witneſſes the laſt, in the ſame manner that almoſt all the ſaſines poſterior to the ſaid ſtatute are ſigned, the objection was without any foundation.

It is the known right and prerogative of the crown to appoint one particular place for taking ſaſine in lands, however diſcontiguous; and the Caſtle of Banff having been appointed the place at which ſaſine for the whole earldom of Buchan was to be taken, the proprietor's aliening, and the crown's of courſe granting the ſaid lands to another perſon without declaring the union to be diſſolved, did not defeat the effect of the prior appointment; and the reſpondent could not be ſeiſed in any other manner upon his retour to James Earl of Buchan, than agreeable to the directions of the

crown in his inveſtiture, and which inveſtiture upon record did notify to all parties intereſted that ſuch ſaſine was ſufficient and perfect. Beſides, this pretended alienation of the Caſtle of Banff is one of the deeds which the reſpondent is to reduce and declare void by this action; and, conſequently, in making up his title he was to pay no regard to it.

No ſuch charter, as was ſuggeſted by the appellants, altering the ſettlement made in the year 1625, appeared, or was ſo much as pretended to be extant in the records: their allegation, therefore, of ſuch charter could not be regarded, as being without any manner of proof. The copy of the ſaſine which the appellants gave in evidence afforded no proof at all, for it was no more than a copy; and though the principal ſaſine itſelf had been produced, yet it being no more than the aſſertion of a notary, without the charter, its foundation and warrant, it could ſignify nothing. If the appellants imagined they could produce ſuch charter, or any other writing which could ſerve for their defence, the reſpondent was willing to agree that a term ſhould be aſſigned them for that purpoſe, yet ſo as they ſhould have the ſame term aſſigned for production of their rights called for. Beſides, though ſuch deed had been produced under which the heirs general might have claimed, as after the ſtricteſt ſearch into the records none did appear; yet theſe heirs general being no parties to this action, having at no time claimed this eſtate, nor made any conveyances to the appellants, the appellants could not found any plea on ſuch charter, nor force the reſpondent to debate the validity or import of it; becauſe, ſhould the reſpondent prevail, he might be again ſued at the inſtance of theſe heirs general, ſo that he could have no advantage of a judgment in the preſent queſtion.

The reſpondent conceives it is improper to take any notice here of the pretended long poſſeſſion of the appellants, in conſequence of their title deeds, if they any have, no evidence having been brought of ſuch poſſeſſion, or ſo much as offered or founded on in the Court below. Beſides, length of poſſeſſion upon redeemable rights can never bar the right of reverſion, nor can it appear whether the rights of the appellants are ſubject to a right of reverſion or are irredeemable, but by a diſcovery of their title deeds, which is the ſcope of the preſent action.

The caſe of the Earl of Caithneſs againſt the Earl of Breadalbane is no ways the ſame with the preſent. The Earl of Breadalbane and other appellants there pleaded, that the right under which the Earl of Caithneſs the reſpondent claimed, which was no more than an ancient appriſing for a pretended debt of very ſmall value, was preſcribed, no poſſeſſion having been had of any of the lands therein contained in 40 years after the date of it, and conſequently that it was utterly void. That the 40 years were elapſed, appeared upon the face of Lord Caithneſs's title, and the only anſwer given was, that he ſaid he could prove that ſeveral ſteps had been taken to interrupt that preſcription. Whereas in the preſent caſe, the reſpondent, as heir male, being legally veſted in this eſtate by the retour and ſaſine in his favour, the

allegation, without any preſent proof offered to the Court below, *that by a ſubſequent charter the eſtate ſtood limited to the heirs general of James Earl of Buchan*, did require a term for proving, and conſequently could not afford a pretence to the appellants to avoid taking a term for production of their title deeds.

The interlocutors appealed from are ſo plainly founded on the uniform practice of the Court below in the like caſes, that the whole judges were unanimous in them, which never happens but in the cleareſt caſes.

Judgment, 25 April 1725.

After hearing counſel, *It is ordered and adjudged, that the ſeveral interlocutory ſentences complained of in the appeal be reverſed: And it is further ordered, that the Lords of Seſſion in the further progreſs of this cauſe, do not oblige the appellants to take a term for production, until the reſpondent, the purſuer below, have made out his title upon which he founds his ſuit.*

For Appellants, *C. Wearg. C. Talbot. Will. Hamilton.*
For Reſpondent, *P. Yorke. Dun. Forbes. Ch. Ariſkine.*

On the point of the union, the interlocutor of the Court of Seſſion here reverſed, is ſtated as an exiſting precedent in the Dictionary, Vol. II. p. 496.

With regard to the witneſſes ſigning only the firſt page of the ſaſine Lord Bankton B. 2. Tit. 3. § 40. rightly ſtates that the judgment of the Court was reverſed: Erſkine on the contrary B. 3. Tit. 2. § 16. mentions this as an exiſting deciſion.

John Earl of Sutherland, and Captain David Roſs, of Daan, Tenant of the Lands of Skelbo - - - *Appellants;*

Mr. Archibald Dunbar, and Sir Thomas Calder, and others, Creditors on the Eſtate of Skelbo - - - *Reſpondents.*

Caſe 122.

19th April, 1725.

Temporary Juriſdiction in the Commiſſioners of Forfeitures.—Claims upon the eſtate of an attainted perſon, which had reverted to a loyal ſuperior, did not fall under this juriſdiction, but remained to the Ordinary Courts.

Proceſs.—Adjudication.—Mails and Duties.—In an action of Mails and Duties brought by an adjudger, the ſuperior to whom the eſtate had reverted makes various objections to the adjudications, as already paid, and as irregular; upon the adjudger finding caution to repeat over-payments, theſe objections are repelled, leaving to the ſuperior his remedy by declarator.

Sequeſtration.—An eſtate of a perſon attainted, which had reverted to a loyal ſuperior, is ſequeſtrated at the inſtance of competing creditors, adjudgers prior to the forfeiture.

IN 1721, the reſpondent Dunbar brought an action of mails and duties before the Court of Seſſion, in right of certain decrees of adjudication in his perſon, againſt the tenants of the lands of Skelbo, which had belonged to the Lord Duffus, but upon his forfeiture for high treaſon, had reverted to the appellant the earl as ſuperior, in terms of the act 1 G. 1. c. 20. and 5 George 1. c. 20.

In this action of mails and duties, the appellant the earl appeared for his intereſt. After the commencement thereof in April 1722, he granted to the other appellant Captain David Roſs, a tack of the ſaid lands of Skelbo, for 19 years from Whitſunday 1722.

The earl at firſt contended, that he was entitled to the lands of Skelbo, and rents thereof, in preference to the reſpondent Dunbar, but the latter inſiſting, that by the acts 1 G. 1. c. 20., and 5 Geo. 1. c. 20. the eſtate was given to the ſuperior ſubject to the vaſſals debts, the Lord Ordinary on the 22d of December 1721, "preferred the reſpondent to the appellant the earl." The appellant objected to this interlocutor on the head of his privilege of parliament; but when his privilege took no place, the Lord Ordinary on the 3d and 7th of July 1722, adhered to his former interlocutor.

Againſt theſe interlocutors the appellant the earl reclaimed to the whole Court, ſtating that the lands falling to him as ſuperior were only liable to a proportional part of the debts adjudged; and Lord Duffus having had other lands they ſhould bear a proportion of the debt. The reſpondent Dunbar made anſwer, contending that he as creditor had a right to affect what eſtate he pleaſed with his debt, without prejudice to thoſe claiming the right of property, aſcertaining the proportion of the debts among themſelves.

ſelves. On the 21ſt of July 1722, the Court "refuſed the de-"ſire of the petition." The earl preſented another reclaiming petition, and, after anſwers, the Court on the 25th of July 1722, "refuſed the deſire of the petition, reſerving to the Earl of "Sutherland to inſiſt in any proper action for extinguiſhing the "adjudications as accords, and allowed the decree to be extracted, "the reſpondent in terms of a conceſſion made by him finding "caution to repay in caſe any part of the ſums in the adjudica-"tion which he inſiſted on as owing, ſhould be made appear to "be ſatisfied and paid." The appellant the earl again petitioned the Court, inſiſting that the adjudications were not regular, and praying to be heard upon the nullities objected to them: but the Court on the 27th of July 1722, "adhered to their former in-"terlocutor, reſerving likewiſe to the earl to inſiſt in any proper "action for reducing the reſpondents' titles on the grounds men-"tioned in the petition or any others."

A commiſſion having been granted to the tenants, to depone as to their rents, on the 5th and 26th of December, 1722, the term was circumduced againſt them, and they were held as confeſſed on certain rents condeſcended on. Other perſons having then applied as creditors on the eſtate, to be made parties, on the 21ſt of February 1723, the Court appointed the "eſtate to be ſequeſt-"rated and remitted to the Lord Ordinary to appoint a factor to "levy the rents:" and purſuant to this remit the Lord Ordinary on the 8th of March thereafter appointed Sir Thomas Calder factor accordingly.

The tenants ſuſpended the decrees obtained againſt them, but on the 20th of November, and fourth of December 1723, interlocutors were pronounced againſt them by the Lord Ordinary, and, on the 12th of December thereafter, by the Court.

Upon the application of the competing creditors praying that Sir Thomas Calder might be continued factor, till the event of the proceſs of ranking was aſcertained, the Court on the 6th of June 1724, "continued the ſequeſtration of the ſaid eſtates and "appointed the ſaid Sir Thomas Calder factor thereon, until their "Lordſhips ſhould think fit to recal the ſame, he giving ſufficient "ſecurity." The appellant Roſs now, for the firſt time appeared in the action, and gave in a petition, inſiſting upon his leaſe of the premiſes from the Earl of Sutherland; and ſtating that the Court of Seſſion had no right to determine the claims upon this eſtate, which came under the juriſdiction of the commiſſioners of forfeitures: after anſwers for the reſpondents, the Court on the 7th of July 1724, "refuſed the deſire of the petition."

Entered, 26 Nov. 1724.

The appeal was brought from "ſeveral interlocutory ſentences or "decrees of the Lords of Seſſion of the 22d of December 1721; "the 3d, 7th, 21ſt, 25th, and 27th of July; the 5th and 26th of "December 1722; the 21ſt of February, 8th of March, 20th of "November; 4th and 12th of December 1723; the 6th of June "and 7th of July 1724."

Heads of the Appellants' Argument.

The Court of Seſſion had no juriſdiction to determine of Mr. Dunbar's claim upon a forfeited eſtate, the power of determining ſuch claims being by act of the 4th of his preſent majeſty's reign c. 8. veſted in truſtees excluſive of all Ordinary Courts. And as ſuperiors are by the act 5 Geo. 1. c. 20. obliged to pay a proportion of the forfeiting perſons' debts, anſwerable to the eſtate returning to them; ſo this proportion ought to have been determined by decree of the ſaid truſtees.

By the proceedings had in the preſent caſe, the whole debt claimed by the reſpondent Dunbar, is made a burden upon that part of the eſtate of the forfeiting perſon which fell to the earl as ſuperior, though the earl was able and offered to have proved to the Court, that the attainted perſon had another eſtate forfeited for the uſe of the publick, which therefore ought to have been liable to a proportion of the reſpondent's claim. The earl further offered to prove to the Court that the reſpondent Dunbar had poſſeſſed the eſtate of the late Lord Duffus, lying in the county of Moray, amounting to 400*l.* yearly, by which poſſeſſion his claim was extinguiſhed.

The reſpondent contended that theſe objections were not available in that ſtate of the proceſs, and were reſerved by the interlocutors of the 25th and 27th of July 1722: but the caſe of the poſſeſſor is always favourable, and a good plea for recovering poſſeſſion, muſt by the principles of law be of greater force to retain it when recovered. And by the law of Scotland, whatever is a legal ground for ſetting aſide a deed, in an action of reduction, is always held a proper defence for a poſſeſſor, when inſiſted againſt in an action to eject him. The reſervation, therefore, in favour of the earl does in effect admit the juſtice of his cauſe, and the iniquity of the decree.

Heads of the Reſpondents' Argument.

The objection to the juriſdiction of the Court of Seſſion was never ſtarted, till after the power of the truſtees for determining claims was expired. But the truſtees for forfeitures had no power of determining claims upon this eſtate, becauſe it was not veſted in them for the uſe of the publick; in conſequence of the act of the 1 Geo. 1. c. 20., it had devolved on the appellant, the Earl of Sutherland, ſubject to the demands of creditors. The appellant himſelf claimed this eſtate not before the truſtees, but the Lords of Seſſion, and the ſame was then decreed to him ſubject to the debts.

The appellant the earl offered to prove that the forfeiting perſon had a ſeparate eſtate, upon which a proportion of the debts ought to have been charged; though this allegation in general might ſeem to merit regard ſo far as to be admitted to proof, yet when the appellant was deſired to mention any one parcel of eſtate that belonged to the forfeiting perſon, he could not particularize any, the Court therefore juſtly looked upon the allegation as groundleſs, and made of deſign to gain time.

The earl alſo offered to prove that the adjudications of the reſpondent Dunbar, were ſatisfied and extinguiſhed by payment, and made ſeveral objections to the regulation of the ſecurities. As this ſeemed only a pretence to retain poſſeſſion, the Court juſtly refuſed a commiſſion to make proof of ſuch general allegations, but reſerved an opportunity to the appellant if he thought fit to bring a proper action for that purpoſe, and the reſpondent gave ſecurity to be anſwerable for whatever ſhould appear to have been over paid.

The appellant Roſs who had a tack from the appellant the earl ſtated that he was turned out of poſſeſſion without being made a party to the action. But the tack in queſtion is dated in April 1722, more than a year after this action commenced, and ſeveral months after the firſt judgment pronounced in favour of the reſpondent; and as he, therefore, could not be originally made a party, ſo there was no occaſion for making him a party afterwards, the queſtion being as to the right of the leſſor, and that being determined againſt him, his leaſe made after the ſuit commenced was of no conſequence.

Judgment, 29 April 1725. After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the ſeveral interlocutory ſentences and decrees therein complained of be affirmed.*

For Appellants, *C. Wearg. Ch. Areſkine.*
For Reſpondents, *Dun. Forbes, C. Talbot. Will. Hamilton.*

Caſe 123. Edgar, 23 Dec. 1724. Volrath Tham, Merchant in Gottenburgh *Appellant*;
Charles Sheriff, and Richard Sheriff *Reſpondents*.

23d *April* 1725.

Factor.—A foreign factor adviſes his correſpondents, that he has diſpoſed of a cargo, and ſhipped returns for it, on both which he charges commiſſion; he afterwards brings an action againſt the correſpondents, alleging that he had ſent his own goods, and had not received proceeds for theirs; but he is not allowed to prove facts contrary to his correſpondence.

The knowledge of the ſhip-maſter though Supercargo, and part owner, not relevant againſt the correſpondence.

Proof.—The factor having refuſed to allow a proof of the ſhip-maſter's knowledge by his own oath, a proof by witneſſes is refuſed him.

IN the year 1717, the merchants who ſent goods to Sweden, ſuffered great loſſes, by an ordinance of the then king, by which a ſmall piece of coined copper, of the ſize of a farthing, called a *Minttoken*, was made current for the value of a dollar Swediſh: having been paid in this ſpecie, the homeward cargoes could not be purchaſed but at a great diſcount.

In 1718, the reſpondents and ſeveral others, who had purchaſed, on their own ſeparate accounts, parcels of herrings, loaded them had

for the Baltick, on board a ſhip of which James Sheriff, brother of the reſpondents was maſter; each adventurer having taken a ſeparate bill of lading for his own parcel, marked with his own mark, and each being to ſtand the riſk of his own adventure. A commiſſion in writing, ſigned by the adventurers, dated the 1ſt of September 1718, was given to James Sheriff the maſter, by which he was empowered to call at Gottenburgh, in his outward voyage, and to ſell and diſpoſe of the cargo of herrings if the market was good and if iron and deals were to be got for the proceeds; but if theſe were not to be got for net proceeds, he was prohibited at any rate to ſell, but to take advice from Stockholm, how markets ruled there; and in caſe they did not anſwer he was to proceed to Dantzick, and there to ſell and reload an inward cargo.

About the middle of September 1718, James Sheriff arrived with his veſſel at Gottenburgh, and immediately applied to the appellant for his aſſiſtance in diſpoſing of his cargo, and delivered to the appellant a letter from the reſpondent Richard, in which were theſe words: "my brother James is now loaded with herrings; you'll be aſſiſtant in diſpoſing of all to the beſt advantage; and what further I have to ſay, I refer you to my brother who has orders to manage my affairs."

The appellant having undertaken the management of this buſineſs, on the 19th of September 1718, adviſed the reſpondent Richard of his having made application to the Swediſh miniſters, Count Morner, and Baron Gortz, to have a bargain made with his Swediſh Majeſty, for iron in exchange for herrings: and by a letter on the 20th of October, to the reſpondent Richard, the appellant wrote as follows: "concerning Mr. James Sheriff's loading, have I ſold to His Majeſty, to wit, every barrel of herrings, accounted to 20 dollars, and every ſhip pound of iron free on board to ſixteen, and ſhall in fourteen days time, or thereabouts, be ready to go from hence. I can aſſure you that I have had incomparable much trouble to get ſo far, becauſe iron is incomparably ſcarce, and ſo much diſpoſed of, and much more as can come down this year." On the 17th of November the appellant again wrote to the reſpondent Richard, in theſe words: "now goes by your brother Captain James Sheriff, who hath had iron for the proceeds of his herrings, and 195 barrels pitch, and 5 barrels tar in diſcount of the old account: I can aſſure you, that he is ſo well expedite, as theſe times ever can be poſſible. I ſend you ſale account of the herrings, amounting to 7004 dollars, and the invoice upon the iron amounting to 8215 dollars, which you will pleaſe after finding right to note conform with me."

On the 20th of November, James Sheriff, the maſter, wrote to his brother Charles as follows: "when I came firſt to the river, I anchored at the new caſtle, and immediately wrote to Stockholm, to know how the price of iron and herrings ruled there; after ſhewing Volrath Tham my commiſſion, and he finding me poſitively reſolved not to ſell at any rate, except I got iron

" and deals for value of herrings, we at laſt concluded a bargain, " and I have received for my loading iron and deals, as per bill " of loading incloſed, which I have ſent for the behoof of the " concerned, in which my ſhare, as part freighter, is alſo in- " cluded."

After James Sheriff was thus loaded, and ready to ſail, he was detained for ſome time by the froſts, and after the death of the then King of Sweden, on the 30th of November 1718, an embargo was laid upon all ſhipping in the river. On the 3d of January 1719, the appellant wrote another letter to the reſpondent Charles, adviſing of this event.

James Sheriff arrived in Scotland in February 1719, and by him the reſpondents received the account ſales of the herrings, and the invoice of the iron and deals, as the proceeds of the outward cargo. By this account ſales and receipt thereon, the appellant acknowledged receipt of the herrings making up 667½ barrels at the prices there ſtated, amounting to a certain ſum, and charges, *inter alia*, 2 per cent., for his commiſſion, mentioning that the ſame were ſold for account of the reſpondent Richard; and by the invoice, the appellant acknowledges that 75 dozen of deals, and 475 ſhip pounds of iron were likewiſe bought for account of the ſaid Richard Sheriff, and he charges 2 per cent. commiſſion for buying the ſame, the deals and 400 ſhip pounds of the iron being ſent for proceeds of the herrings, and 75 ſhip pounds of iron in payment of a former balance. And upon the footing of theſe vouchers and the letters of correſpondence, the ſeveral freighters, cleared accounts with James Sheriff the maſter, paid him his freight, and divided the homeward cargo.

Afterwards in December 1719, the reſpondent Richard received a letter from the appellant, informing him that 442 barrels of the herrings had been ſold by him to the king of Sweden, with the knowledge and advice of James Sheriff the maſter, for iron, which was not delivered, not being come down from the mines; and as a favour to James Sheriff, who had lain a conſiderable time at the port, he had taken the liberty to ſhip on board his veſſel 280 ſhip pounds of iron, purchaſed in return of herrings ſent by Meſſieurs Hogs, on board a ſhip of which James Young was maſter, from one Klaas Habecht: that upon the King of Sweden's death, a ſtop was put to the delivery of iron on the king's contract, and the appellant was obliged to purchaſe iron at a much greater price, to put it on board the ſaid James Young's ſhip, on account of Meſſieurs Hogs; and that the iron due for the reſpondents herrings was ſtill a debt upon the Crown of Sweden: and the appellant incloſed an account current, charging the reſpondents with the difference of price between the 280 ſhip pounds of iron, at the former price of 38 copper dollars, and the new price at 54 copper dollars per ſhip pound; for which he alſo drew bills upon them.

Upon

Upon their refuſal to pay he brought an action againſt them before the Court of Seſſion, for the price of the ſaid 280 ſhip pounds of iron, and likewiſe for the price of 58 pounds more, at the rate of 54 dollars per ſhip pound, and the appellant craved that the Court would allow him to prove the matters and facts alleged by him. After defences for the reſpondents, the Court on the 25th of July 1724, "found that the appellant having ad- "viſed by his letter of the date the 17th of November 1718, "that iron was loaded for the proceeds of the herrings, conform "to James Sheriff's commiſſion as ſuper-cargo, and his letter of "the 20th of November aforeſaid, the appellant could not now "be allowed to prove contradictory facts to his former correſ- "pondence; and found the allegeance that James Sheriff's know- "ledge, (the party concerned in the outward voyage) that part "of the appellant's iron and Young's was on ſhip-board in re- "turn for the outward cargo, was not relevant againſt the re- "ſpondents, and found no preſumption that James Sheriff did "adviſe the freightors of the true fact."

The appellant reclaimed, inſiſting, that James Sheriff *the brother, truſtee, and ſuper-cargo was privy to the real tranſaction and ought to have informed the others of it:* and therefore the appellant again prayed to have a proof of his allegations: to this petition the reſpondents put in anſwers, and the Court on the 26th of December 1724, "adhered to that part of the former interlocu- "tor, of the 25th of July laſt, finding that the appellant having "adviſed by his letter of the 17th of November 1718, that iron "was loaded for the proceeds of the herrings conform to James "Sheriff's commiſſion as ſuper-cargo by the freighters, and his "letter of the 20th of November aforeſaid, the appellant could "not now be allowed to prove contradictory facts to his "former correſpondence; and in regard the appellant did not "offer to prove James Sheriff's knowledge of the facts found- "ed on by his oath, refuſed to allow any proof thereof by wit- "neſſes."

The appeal was brought from "two interlocutors of the Lords "of Seſſion made the 25th of July, and 26th of December "1724." Entered, 14 Jan. 1724-5.

Heads of the Appellant's Argument.

If the facts inſiſted upon by the appellant ſhould be made out upon proof, it is extremely reaſonable that he ſhould have relief. It were very hard, if a merchant or factor, out of favour or friendſhip to his correſpondents, load his own goods aboard their ſhip, before the goods that properly belong to them come to hand, in order that the ſhip may ſail more ſpeedily, and omits to give notice that the goods ſo ſhipped were his, and not theirs; but in general informs them, that they have ſuch goods on board for the proceeds of their outward cargo; and afterwards upon diſcovering his correſpondent's goods are loſt or incumbered, ſhould not be able to repair his miſtake, and upon proof of the fact recover the value of his goods; for the *bona fides* that prevails in

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" and I have received for my loading iron
" of loading included, which I have ſent
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[illegible] correſpondents are allowed to vary in their advices of facts
[illegible] with their knowledge, commerce would be-
[illegible] impracticable, neither could accounts be ever concluded;
[illegible] appellant, when he pretended to rectify a miſtake in the
[illegible] by his letter of the 10th of July 1719, and 3d.
[illegible] claimed only the difference money to conclude
[illegible] whereas, as if he had fallen into a ſecond miſtake,
[illegible] he inſiſted further, for the value of 338 ſhip pounds
[illegible] a plain evidence of what dangerous conſequence to
[illegible] it muſt be to allow correſpondents to vary in point of
fact.

As to the pretence, that this tranſaction conſiſted with the knowledge of James Sheriff, the reſpondents contend, that though he was part freighter, as well as maſter of the ſhip, yet the adventurers having ſeverally purchaſed their parcels of herrings, taken ſeparate bills of lading each for his own particular parcel, marked with his own mark, and James Sheriff having but a commiſſion expreſsly limited, and ſhewn to the appellant, his knowledge, or even conſent, could not found an action againſt the reſpondents.

Though the appellant could poſſibly bring parole evidence to diſprove the matters affirmed by him in his correſpondence ſo long after the negotiation was finiſhed, and the reſpond

in all mercantile dealings, forbids that advantage ſhould be taken of caſual miſtakes or omiſſions for which probable cauſes may be aſſigned, and common juſtice will not allow that one man ſhould profit by this innocent miſtake of another.

The correſpondence itſelf does not ſo fully expreſs this matter, as to deprive the appellant of a liberty of making proof of theſe facts. Nothing therefore could be more reaſonable than to allow the appellant to make proof of theſe facts, eſpecially when he charged that they might have had notice of the real fact by James Sheriff who was privy thereto.

The appellant had no reaſon to prove James Sheriff's knowledge of theſe facts by his own oath, becauſe that would, by the law of Scotland, have been concluſive againſt him, and he could not have been at liberty to falſify that oath. It was therefore juſt, that the appellant ſhould be at liberty to prove that fact, as well as the others, and in the ſame manner.

Heads of the Reſpondents' Argument.

To prevent a prejudice, which one of the reſpondents had formerly ſuffered, a limited commiſſion was given to James Sheriff, and accepted of by him, wherein he was expreſsly required not to ſell the herrings except he could load iron and deals for the net proceeds: James Sheriff ſhewed this commiſſion to the appellant, and both of them acted in purſuance of it, as appeared by the appellant's and James Sheriff's letters; therefore the appellant could not be allowed to prove facts, at ſuch an interval of time, inconſiſtent with his own accounts and advices ſent to the reſpondents.

If correſpondents are allowed to vary in their advices of facts admitted to conſiſt with their knowledge, commerce would become impracticable, neither could accounts be ever concluded; and the appellant, when he pretended to rectify a miſtake in the correſpondence by his letter of the 10th of July 1719, and 3d. of February 1720, claimed only the difference money to conclude all accounts; whereas, as if he had fallen into a ſecond miſtake, in his action he inſiſted further, for the value of 338 ſhip pounds of iron, a plain evidence of what dangerous conſequence to trade it muſt be to allow correſpondents to vary in point of fact.

As to the pretence, that this tranſaction conſiſted with the knowledge of James Sheriff, the reſpondents contend, that though he was part freighter, as well as maſter of the ſhip, yet the adventurers having ſeverally purchaſed their parcels of herrings, taken ſeparate bills of lading each for his own particular parcel, marked with his own mark, and James Sheriff having but a commiſſion expreſsly limited, and ſhewn to the appellant, his knowledge, or even conſent, could not found an action againſt the reſpondents.

Though the appellant could poſſibly bring parole evidence to diſprove the matters affirmed by him in his correſpondence ſo long after the negotiation was finiſhed, and the reſpondents had

had cleared with one another, and the other parties concerned, he ought to have no advantage from it; and, further the circumſtances of the caſe, and the vouchers founded on by the reſpondents muſt find greater credit, than any evidence that could ariſe from the oaths of perſons whoſe characters are unknown, and who were not particularly acquainted with the whole facts in queſtion.

If the appellant really ſold ſuch parcel of herrings to the royal deputation, it was upon his own riſk, having acted only in purſuance of the limited commiſſion given to James Sheriff, who neither lawfully could, nor did conſent to the diſpoſing of the herrings but upon the condition of being reloaded with iron and deals: he had 4 per cent. upon the whole cargo, for procuring the ſaid iron in exchange for the herrings; and if the iron had really afterwards been delivered by the royal deputation, when the price advanced, the appellant neither would have accounted, nor could he have been compelled to pay the difference to the reſpondents of the advanced price upon the iron; ſo that the ſale, if any ſuch there was to the royal deputation, was at his own peril.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutors therein complained of be affirmed.* Judgment, 23 April 1725.

For Appellant, *Dun. Forbes. C. Talbot. Will. Hamilton.*
For Reſpondents, *C. Wearg. C. Areſkine.*

Sir Alexander Maxwell of Monreith, Bart. *Appellant;* Caſe 124.
Andrew Houſton, Eſq. - - *Reſpondent.* Dalrymple, 28 Jan. 1715.
Et e contra.

30th *April* 1725.

Viciation.—An objection to a deed that it was erazed in *ſubſtantialibus* is repelled. *Vitious Intromiſſion* and *Geſtio pro Hærede.*—A perſon grants an entail of his eſtate to his ſon, and his heirs male whatſoever; with the burden of his debts; the ſon grants a back bond, in conſideration of ſaid entail to pay the father's debts: after the death of the father and ſon, the daughters convey the eſtate real and perſonal of their father to a creditor, without making up titles by inventory or confirmation; and the creditor grants bond to protect them againſt what they had done, and from the debts of their father; the heir male of entail having got back the eſtate ſues the ſaid creditor for debts of the father as a vitious intromitter, in which he obtains decree; and the Court alſo find the moveable debts due to ſuch intromitter to be extinguiſhed: but their judgment is reverſed; and the creditor is ordered to account for actual intromiſſions only.

WILLIAM HOUSTON of Cultreoch on the 17th of January 1691, made a ſettlement and entail of his eſtate to himſelf in life-rent, and to William his ſon, and his heirs male whatſoever,

ever, with the burden of payment of the grantor's debts: and at the ſame time William the ſon executed a bond whereby he became perſonally bound to relieve his father of certain debts he had contracted before making the entail. William the father dying in February 1709, leaving his ſaid ſon and four daughters; and the ſon dying in March thereafter without iſſue, the eſtate by ſaid entail deſcended to the father of the reſpondent the brother of William Maxwell the elder; and the reſpondent's father in July 1709, was duly ſerved heir of proviſion in the ſaid eſtate, and after his death the reſpondent obtained a charter thereof, under the great ſeal upon which he was duly inſeft.

The eſtate of Cultreoch being conveniently ſituated for the appellant's father, he had procured from William the father, and William the ſon a deed, dated 30th April, and 3d May 1708, whereby they became bound under a penalty of 2000*l.* Scots, to prefer Sir William Maxwell to any other purchaſer in caſe they ſhould ſell theſe lands; and ſoon after the death of the two Williams, father and ſon, the appellant's father brought an action againſt the daughters, on the ground of the ſaid deed, and of certain debts ſecured on the eſtate which he had purchaſed: two of the daughters who were married, and their huſbands, and two who were ſingle, diſponed and conveyed to the appellant (his father being then dead,) the whole real and perſonal eſtate of their father and brother, for the conſideration of a ſmall ſum: and the appellant granted them an obligation to indemnify the daughters and their huſbands againſt all debts owing by the father and brother, and all actions that might be brought againſt them on that account; theſe deeds were dated in April and May 1709.

The appellant thereupon took poſſeſſion of the charter cheſt of the family, and carried the ſame to his own houſe, having broken the ſeals put on it by the proper judge; and he alſo poſſeſſed himſelf of the whole eſtate real and perſonal; and having poſſeſſed the perſonal eſtate for ſeveral months without confirmation, he afterwards to guard himſelf againſt any bad conſequences therefrom, procured himſelf to be confirmed executor, and got the confirmation to be antedated ſeveral months.

In the mean time the reſpondent having made up a title by ſervice, charter and ſaſine, the appellant brought an action againſt him for payment of certain debts to which he had acquired right, and which were ſecured upon the eſtate; and the reſpondent thereupon commenced his counter action concluding that it ſhould be declared, that the daughters as vitious intrometters, and having behaved as heirs to their father, and Sir Alexander Maxwell, as repreſenting them, were bound to pay all the father's debts; and that the debts in the perſon of Sir Alexander were thereby extinguiſhed.

The appellant appeared, and ſtated in defence to this action, that there was a manifeſt erazure in the deed 1691, under which the reſpondent claimed, for which he inſiſted the deed was invalid; in the clauſe ſettling the eſtate upon William the father in life-

life-rent, and William the ſon *and his heirs male whatſoever* as it ſtood in the deed, after the words *heirs male*, there was a plain erazure of two or three words, and thereon was written the word *whatſoever*: The Court on the 20th of June 1711, "ſuſ- Appealed
"tained the deed of ſettlement, and repelled the objection from by Sir
"founded on the alleged vitiation thereof." And to this inter- Alexander.
locutor they adhered on the 10th and 17th of July thereafter. Ditto ditto.

The reſpondent then inſiſted on the vitious intromiſſion by the heirs general, whom the appellant was bound to indemnify; and the appellant having ſtated his defence, that he had obtained confirmation before commencement of the action againſt him, as ſufficient to defend him from the effects of vitious intromiſſion; the reſpondent anſwered that not only the confirmation was antedated, but that the appellant had intromitted with more than he had given up in the inventory. The Court on the 13th of De- Ditto ditto.
cember 1711, "ſuſtained the appellant's defence as relevant;
"and allowed both the appellant and reſpondent a proof of the
"ſeveral facts alleged by them:" and, after various proceed- Ditto ditto.
ings, this interlocutor was adhered to on the 13th of February 1713.

The appellant now preſented a petition to the Court praying that the ſheriff depute, and juſtice of the peace who inſpected the charter cheſt, when it was ſealed up at the deſire of the daughters upon the death of William the ſon might be examined as to what writings they ſaw; and alſo that the Court would allow a probation of William the father's, and William the ſon's circumſtances at the times of their death; and that certain creditors, to whom the appellant alleged his father had paid their debts, by the directions of William the father, might be examined as to the reality of their debts, and the payments ſo made to them, by which it might appear how far the appellant was a juſt creditor for the ſums claimed by him. The reſpondent in his anſwers acknowledged that ſome of the debts had been truly owing, but he inſiſted upon the ground of law, that the whole debts were extinguiſhed by coming into the perſon of one who was obliged to pay them. The Court on the 25th of February 1713, "re- Ditto ditto.
"fuſed the deſire of the petition as to proving Cultreoch's cir-
"cumſtances, or taking the oaths of the petitioner's cedents;
"but allowed a conjunct probation to both parties for proving
"what papers were in the charter cheſt."

The objection made to the confirmation by the reſpondent, was, that though ſigned in October 1710, it bore date the 13th of July 1709, being the date of the decree dative: the appellant offered to prove that ſuch was the common practice of the Court which granted the confirmation; but the Court on the 29th of July Ditto ditto.
1713, "refuſed the deſire of this petition."

Witneſſes having been examined, the cauſe was heard, and the Court on the 9th of December 1714, "found that Sir Alexander Ditto ditto.
"Maxwell by his bond of relief to the heirs of line is in the ſame
"ſituation as to the debts of Cultreoch, paid and tranſacted by him,
"as the ſaid heirs of line would have been, if they had paid and
"had

" had tranſacted the ſaid debts:" and to this interlocutor
Appealed from by Sir Alexander. the Court adhered on the 12th of January 1715. On the 21ſt
of ſame month, the Court pronounced the following interlocutor:
Ditto ditto. " having again conſidered the ſtate of the proceſs, and adviſed the
" ſame with the teſtimonies of the witneſſes adduced, and writs
" produced for probation, with the debate, and petition given in
" by Sir Alexander Maxwell, and anſwers thereto by Andrew
" Houſton, find the defence of extinction of heritable debts in
" the perſon of a vitious intromitter not relevant to be alleged by
" an heir male; but ſuſtain the defence of extinction of move-
" able debts paid by a vitious intromitter: and find the qualifi-
" cations of vitious intromiſſion againſt Sir Alexander Maxwell,
" relevant and proved: and likewiſe find the qualifications of the
" paſſive title of Behaviour as heir, relevant and proved againſt
" the heirs of line: and find that Andrew Houſton now the
" heir male, is not obliged to relieve the heirs of line, by the
" quality of the diſpoſition granted by Cultreoch elder to his ſon
" and heirs male; and the bond granted by Cultreoch younger
" obliging him, his heirs, executors, and ſucceſſors to relieve his
" father of all debts." And to different parts of this interlocutor
the Court adhered on the 12th of July and 9th of November
1716.

After a further hearing of the cauſe, however, the Court on
Ditto ditto. the 12th of July 1717, "found that abſtracting from the diſ-
" poſition by Cultreoch the elder to his ſon, and qualities thereof,
" there is no relief competent to the heirs of line, or to Sir
" Alexander Maxwell, as coming in their places againſt the heir
" male for any debts of Cultreoch's, paid by the ſaid heirs of line,
Ditto by Houſton. " or by Sir Alexander himſelf: but having conſidered the
" diſpoſition by Cultreoch elder to his ſon, and qualities thereof,
" found that the debts of Cultreoch elder, were burdens on the
" ſubject diſponed by him to his ſon, and that Andrew Houſton
" as heir male to the eſtate of Cultreoch, contained in the ſaid
" diſpoſition, in right and virtue of that diſpoſition is obliged to
" relieve the ſaid Sir Alexander and the heirs of line of all the
Appealed from by both. " ſaid debts." To this interlocutor the Court adhered on the
Ditto ditto. 29th of November and 12th of December 1717; and on the 10th
Appealed from by Sir Alexander. of June 1718 they " ordained Sir Alexander to give in a conde-
" ſcendance of the debts due by William the father at the time
Ditto ditto " he made the entail."

Afterwards on the 22d of January 1720, the Court " ſuſtained
" the defence proponed for Andrew Houſton, that Sir Alexander
" Maxwell had intrometted with the moveables which belonged
" to Cultreoch the elder, or to his ſon after their deceaſe, rele-
" vant *in tantum* to extinguiſh the debts of the ſaid Cultreoch,
" and his ſon in the perſon of Sir Alexander the intromitter to
" the extent and value of theſe moveables intrometted with;
" and alſo found that relief is not competent to Sir Alexander,
" againſt Andrew Houſton, for any ſums in new bonds granted
" after the date of the diſpoſition by the ſaid Cultreoch the elder
" to his ſon, though it were inſtructed that theſe new bonds

" were

" were both innovations of old bonds, dated before the ſaid diſ-
" poſition, and coming in place of theſe old bonds."

The original appeal was brought from " ſeveral interlocutory " ſentences or decrees of the Lords of Seſſion of the 20th of June, " 10th and 17th of July, and 13th of December 1711, the 13th " and 25th of February, and 29th of July 1713, the 9th of " December 1714, the 12th and 21ſt of January 1715, the 12th " of July and 9th of November 1716, the 12th of July, 27th " of November and 12th of December 1717, the 10th of June " 1718, and 22d of January 1720." Entered, 25 Nov. 1724.

And the croſs appeal from " part of the abovementioned inter- " locutor of the 12th of July 1717, and of an interlocutor of the " 29th of November 1717." Entered, 3 March 1724-5.

On the Original Appeal.—Heads of the Appellant's Argument.

The ſettlement, under which the reſpondent claims, is plainly erazed in the moſt material article, the very part on which the reſpondent's right depends. There might, and probably have been words in that ſpace, which now ſtand obliterated, that would have defeated the reſpondent's claim; and the reſpondent produced no manner of evidence that the deed ſtood ſo erazed at the time it was executed, or at any other time during the grantor's life, though ſurely he muſt have been ſuppoſed capable of making ſuch proof had the fact been true; and by the deed as it ſtands erazed, the eſtate, on failure of heirs male, muſt have devolved on the crown in prejudice of the grantor's own daughters, and the iſſue female of his ſon, a ſettlement which no man in his ſenſes can be ſuppoſed capable of having made.

Suppoſing this deed valid notwithſtanding the erazure, yet as it was dormant, and not publiſhed in the proper manner by regiſtration, or infeftment, all the debts contracted by the grantor during his life were as much a charge upon the eſtate by the undoubted law of Scotland, as thoſe contracted before the date of the ſettlement; and the making any diſtinction by cutting off the one kind, and allowing the other, is erroneous.

As this deed was dormant, the heirs at law might lawfully enter on the eſtate; and the appellant's purchaſe was honeſt and fair, the firſt offer of the eſtate having been intended him by the deceaſed, the undoubted proprietor: in theſe circumſtances the entry of the heirs, and the appellant's purchaſing could be attended with no penalty.

The heirs at law by intromitting with their father's eſtate, did not ſubject themſelves univerſally to their father's debts, if it be true that the eſtate with which they intromitted, did not deſcend to them by reaſon of the ſettlement under which the reſpondent claims, becauſe, by the law of Scotland, *acting as heir* is inferred only from a perſon's meddling with an eſtate to which he has an undoubted title to ſucceed. And as the heirs at law, whom the appellant was bound to indemnify, were not liable for the debts, ſo neither could the appellant in conſequence of his bond, becauſe that bond and the obligation therein contained

became void, the moment the conveyance in conſideration of which it was granted was ſet aſide.

The appellant's intromiſſion with the perſonal eſtate was innocent in virtue of a proper title, an aſſignment by the daughters, to whom the perſonal eſtate had formerly been aſſigned by their father; and they had alſo a legal title to it as neareſt in kin; ſo that on the ſuppoſition that this perſonal eſtate is, in the firſt place, liable to anſwer the debts of the deceaſed, the appellant can be no further liable than to account for ſo much thereof as he received, in terms of the interlocutor 22d January 1720.

With regard to what the reſpondent founded upon the poſſeſſion had by the appellant of the charter cheſt; the daughters, no other right appearing, had a title to the deeds; and they being aſſigned to the appellant he might warrantably take them into his poſſeſſion. The argument of the reſpondent goes only to this, that it is poſſible the debts now claimed by the appellant might have been paid off by the deceaſed in his lifetime, and that the bonds might have been locked up amongſt his writings, and might have been taken from thence by the appellant, who might again have procured freſh aſſignments from the original creditors in his own name. But this ſuggeſtion muſt have been totally deſtroyed by the evidence which the appellant offered, had he been permitted to bring it, viz. the oaths of the creditors, and of the writers of, and witneſſes to the ſeveral aſſignments; moſt of theſe debts too were ſecured by heritable bonds, and if theſe had been paid off, the diſcharges muſt have been recorded within 60 days, ſo that the taking away ſuch diſcharges could have been of no uſe.

Heads of the Reſpondent's Argument.

By the known laws of Scotland, the heirs of line, or heirs general, who ſeize upon the perſonal eſtate of their predeceſſor without making an inventory of it, or who conceal a part of the eſtate, and make up imperfect inventories, which is called *vitious intromiſſion*, are bound to pay all the debts of their predeceſſor: and ſuch heirs general as intermeddle with the charter cheſt, or writings, or any part of the real eſtate of their predeceſſor, which is called *behaving as heirs*, are bound to pay his whole debts real and perſonal, and to relieve the heir of entail of them. Nor can this burden upon the heirs general be reſtricted to the value of the eſtate they ſucceeded to, even though they entered with the uſual ſolemnities, unleſs they have in a regular manner made up faithful inventories of the eſtate before intermeddling with it.

The erazure in the deed 1691, ſtated by the appellant, is no more than may commonly happen in every writing; nor is the deed vitiated in any ſubſtantial part of it. To ſhew how groundleſs the objection was, the reſpondent all along offered to allow any words to be ſuppoſed, that could be contained in that ſpace, and were conſiſtent with common ſenſe, and the uſual form of ſuch writings: but none can be contrived that will give the appellant any advantage.

The

The appellant did indeed get himſelf confirmed executor, but the confirmation was antedated ſeveral months, to give a colour to his defence on that head: and though the inventories were made up ſeveral months after the appellant had intrometted with the perſonal eſtate, yet he concealed part of the goods he had actually ſeized; which, by the law of Scotland, does unqueſtionably render him liable for the whole perſonal debts.

With regard to the proof offered by the appellant by the oaths of creditors, the reſpondent acknowledged that ſome of the debts were truly owing; but he contended that others were ſimulate, or had been paid and the bonds retired; and to examine perſons upon oath to eſtabliſh debts due to themſelves would have been inconſiſtent. But the reſpondent reſted upon this unqueſtionable ground of law, that the debts, whether true or not, were extinguiſhed by coming into the perſon of the appellant, who was obliged to pay them.

Heads of the Appellant's Argument—On the Croſs Appeal.

Though the perſonal bond of William the ſon be mentioned and recited in the deed of entail, yet it is by no means made a condition of the entail, nor inſerted in the procuratory of reſignation, or precept of ſaſine, without which, by the law of Scotland, it can never be a real burden on the eſtate.

By this perſonal bond William the ſon obliges himſelf, his heirs, executors, and ſucceſſors, to pay the debts of his father, and by the known law of Scotland, the heirs general are in the firſt place obliged to perform this bond, and to relieve the heir male of it; which was known and underſtood by William the father when he accepted of the bond.

Even upon the footing of William the ſon's perſonal bond being a real burden on the eſtate, yet where William the father obtained a diſcharge of any debt due to him at the time of making the entail, that debt could be no longer a burden on the entailed eſtate, but muſt be conſidered as extinguiſhed, and cannot afford a pretext for ſubjecting the heir of entail to new debts contracted after the date of the deed of ſettlement: and at all events ſuch part of the eſtate as Sir Alexander intrometted with, ſhould be applied towards payment of the debts of William the elder.

Heads of the Reſpondent's Argument.

The deed of ſettlement under which the appellant claims is made ſubject to the payment of the grantor's debts, and there ſeems to be no reaſon for the appellant to claim that eſtate, without performing the conditions of the deed under which he claims; that is, paying off the debts before that time owing by the grantor: and in equity he ought to relieve the heirs at law, and the reſpondent as claiming under them, of all the debts, both before and after the date of the conveyance, the eſtate being truly ſubject to them.

Judgement, 30 April 1725.

After hearing counſel on both ſides, and due conſideration had of what was offered by them in theſe cauſes, *It is ordered and adjudged, that the interlocutory ſentences or decrees of the 20th June, 10th of July, and 17th of July 1711, be affirmed; and that all the other ſubſequent interlocutors complained of by the appellant Sir Alexander Maxwell be reverſed; and that the appeal of the reſpondent Andrew Houſton, Eſquire, be diſmiſſed; and that in the further proceedings in this cauſe, the Lords of Seſſion do allow to the appellant Sir Alexander Maxwell ſuch debts as he ſhall make out a right to, and that he be anſwerable to the reſpondent for ſo much of the perſonal eſtate, and of the rents and profits of the real eſtate as ſhall be made out that he hath received; and if it be proved that the appellant Sir Alexander Maxwell hath abſtracted or taken away any particular papers out of the charter cheſt, the ſaid Lords ſhall, for ſo doing, proceed againſt him as is juſt.*

For Sir Alexander Maxwell,	*Dun. Forbes.* *Will Hamilton.*	*C. Talbot.*
For Andrew Houſton,	*C. Wearg.*	*Will. Fr*

Part of the judgment, here reverſed, is ſtated in the Dictionary as an exiſting deciſion, vol. 2. *Paſſive Title*, p. 44.

It is alſo ſo ſtated by Lord Bankton, b. 3. tit. 9. § 16. and by Erſkine, b. 3. tit. 9. § 55.

Neilſon, of Chappell, Eſq; - - *Appellant*; Caſe 125.
Murray, of Conheath, Eſq; - - *Reſpondent.* Edgar, 22 Jan. 1725.

16th *Feb.* 1725-6.

Papiſt.—Jus tertii.—An eſtate deſcends to two heirs portioners; the eldeſt a Papiſt, by her firſt marriage, has a ſon, a Proteſtant; in a contract on her ſecond marriage ſhe covenants to ſettle the eſtate on her huſband and the heirs male of that marriage. After her ſecond huſband's death, the eldeſt ſon of that marriage, a Papiſt, grants a diſpoſition of the eſtate to a third party: no titles had been hitherto made up by this ſon of the ſecond marriage, nor by his mother; but the diſponee now gave them a charge to enter heirs, and thereupon got adjudication. It was not *jus tertii* to the Proteſtant heir of the firſt marriage to object againſt this diſpoſition.

Papiſts on whom the ſucceſſion to heritable ſubjects devolved before the act 1700, were nevertheleſs precluded from ſerving heirs after that act paſſed without taking the *formula*.

An *onerous* purchaſer from a Papiſt could not be in a better ſituation than the Papiſt himſelf.

A perſon *popiſhly educated*, who never took the formula, held to be a Papiſt.

An objection that a queſtion was not moved of the diſponee's Popery, and that he never was required to take the formula during his life, is repelled.

The act of parliament 3 G. 1. c. 18. did not extend to Papiſts in Scotland.

E reſpondent, in 1718, brought an action before the Court Seſſion for reduction of ſeveral deeds, by virtue of which pellant claimed the property of part of the lands of Con-

The circumſtances of the caſe, as ſtated by him, were,

it Alexander Maxwell, of Conheath, the reſpondent's grand- , died in 1655, ſeiſed of the lands of Conheath, leaving two ters, Elizabeth and Margaret, his heirs portioners; Eliza- the eldeſt daughter, was popiſh, and in 1671, intermarried Gilbert Murray of Urr; and had iſſue the reſpondent, a tant, and James, a Papiſt:

it after Gilbert Murray's death, Elizabeth, his widow, in intermarried with Gilbert MacCartney, and by the marriage Elizabeth (though never ſerved heir to her father, nor infeft ſaid lands of Conheath) conveyed all right ſhe had to her the eſtate to the ſaid Gilbert MacCartney and herſelf, "in junct fee and life-rent, and the ſurvivor of them, and the s of their bodies, begotten of the future marriage, which ing"—then followed a blank never filled up:

it the ſaid Gilbert MacCartney died in 1695, leaving iſſue t marriage, William, ſince deceaſed, a Papiſt, and Mar- till alive, and alſo a Papiſt: and the mother, deſigning to e the reſpondent, her eldeſt ſon, from the ſaid eſtate, be- of his being a Proteſtant, executed a deed, reciting her of inheritance of the ſaid eſtate, and thereby conveyed the to her younger ſon of the firſt marriage, James, a Papiſt; his James afterwards procured a diſpoſition from William artney, the ſon of the ſecond marriage, who had not been heir to his father, nor of that marriage, conveying all

rent, and all right and title he had or could clai
eſtate, without regarding her former diſpoſition to
in order, ſo far as was in her power, to diſ
ſpondent:

That the reſpondent was, in 1717, ſerved
to Alexander Maxwell his grandfather, as laſt
ſaid lands of Conheath; though his ſervice was
mother, and by Robert Murray, ſon of the ſaid
then deceaſed, as well as by the appellant, who
title to the eſtate on the ground of an agreement
Alves to convey to him: and after the reſpond
diſpoſition was granted by Alves to the appellant,
December 1717 (*a*).

The reſpondent founded his action on the act
1695, c. 26. ment of Scotland 1695, c. 26. intituled, "Act
piſh perſons to prejudge their Proteſtant heirs i
1700, c. 3. and on the act 1700. c. 3. intituled, "Act to prev
of Popery," in ſo far as the incapacity of a Papiſ
convey to a gratuitous diſponee was involved i
tended, therefore, that the conveyance and title g
liam MacCartney to Alves, under which the app
was void, William MacCartney being a Papiſt,
being in prejudice of the Proteſtant heir.

The appellant, at firſt, in defence, contended
tertii to the reſpondent to object againſt the
queſtion, this being only competent to the Proteſta
bert MacCartney, the father of William; for that t
mother diveſted herſelf of the fee of the eſtate i
ſecond huſband MacCartney in 1688. The Cou
of July 1722, repelled the objection of *jus tertii*
"appellant; and found that it was competent f
"dent to object againſt the diſpoſition made by

fore the reſpondent claimed any title as Proteſtant heir. After anſwers on this point, the Court, on the 14th of December 1722, "Found that by the act of parliament 1700, Papiſts at or after "their age of 15 years, are diſabled to ſucceed by ſerving themſelves heirs in lands or other heritage after the date of that act, "as well where the fee of the ſaid lands, &c. had opened by the "deceaſe of the predeceſſor laſt inſeft, before the date of the ſaid "act of parliament, as where the predeceſſor ſurvived that time; "and found that the appellant, by being an onerous purchaſer, "could not be in a better caſe than MacCartney, the alleged "Papiſt, from whom the appellant's right was by progreſs de"rived." And to this interlocutor the Court adhered on the 8th of February 1723.

The appellant afterwards craved and obtained a proof; and, after adviſing the ſame, the Court, upon the 14th of November 1724, "Found it proved that the ſaid William MacCartney was "Popiſhly educate, and found no evidence that he took the for"mula in terms of the act of parliament."

The appellant reclaimed, contending that it did not appear that William MacCartney had been educated in the Popiſh religion in terms of the act 1700; that the queſtion could not be ſtirred after his death; and that the appellant's title was ſaved by the act 3 G. 1. c. 18. in favour of Proteſtant purchaſers. After anſwers for the reſpondent, the Court, on the 4th of December 1724, "Adhered to their former interlocutor, reſerving the con"ſideration of the other parts of the bill." And upon the 23d day of January 1725, they "repelled the objection, that a queſ"tion was not moved of MacCartney's being a Papiſt, and not "having taken the formula during his life; and repelled the ob"jection upon the act of parliament 3 G. 1. in favour of Pro"teſtant purchaſers."

The appeal was brought from "ſeveral interlocutors or decrees "of the Lords of Seſſion of the 10th of July and 14th of De"cember 1722, the 8th of February 1723, the 14th of Novem"ber and 4th of December 1724, and 23d of January 1725." Entered, 6 Feb. 1724-5.

Heads of the Appellant's Argument.

The full and abſolute property of the ſaid eſtate was veſted in the ſaid Elizabeth Maxwell at the time of her contract of marriage with the ſaid Gilbert MacCartney; and ſhe having by the contract, no leſs than 36 years ago, conveyed the ſame for a valuable conſideration to and in favour of the ſaid Gilbert Mac Cartney, and the heirs of the marriage, the fee of the ſaid eſtate devolved abſolutely upon the ſaid William MacCartney after his father's death, long before the act of parliament 1700. He conveyed the fee which was in him, and his mother conveyed her life-rent, and all other intereſt and title ſhe was poſſeſſed of, to Alves, the appellant's author, for a full and valuable conſideration: and a legal title to the eſtate was eſtabliſhed in the perſon of Alves, with infeftment and regiſtration, long before any claim was made, or mentioned to be made, by the next Proteſtant heir.

Though the reſpondent, therefore, were next Proteſtant heir to the ſaid William MacCartney, which he is not, and though William had not ſucceeded till after the act 1700, and had actually been convicted of Popery, yet the reſpondent cannot pretend as next Proteſtant heir to overturn the title of the appellant.

The reſpondent is ſo far from being next Proteſtant heir to the ſaid William MacCartney, that he is in no way related, either to him or to his father Gilbert, to whom the eſtate belonged; and therefore he has no title to object Popery to the ſaid William, or to any perſon deriving right from him.

The right of William Alves to the ſaid eſtate of Conheath was ſet up and produced againſt this very reſpondent upwards of ten years ago, in a former action, brought by the reſpondent for eſtabliſhing his right to the ſaid eſtate; and all the pretences of the reſpondent were then ſet aſide; though he had as much right at that time as he has now to enter as next Proteſtant heir. The title of the appellant's author Alves was made public by adjudication prior to, and was ſaved by a proviſo in the act 1700, and by the act 3 G. 1. c. 18. in favour of Proteſtant purchaſers.

No. 55. of this collection.

Heads of the Reſpondent's Argument.

The eſtate in queſtion belonged to the reſpondent's grandfather, to whom he was ſerved heir. Elizabeth, the reſpondent's mother, never having been ſerved heir to her father, had no title in her perſon, and conſequently could make no conveyance to MacCartney her ſecond huſband. And although ſuch conveyance had been effectual, yet MacCartney was never infeft in theſe lands, nor did William his ſon ſerve heir of proviſion to him; conſequently neither father nor ſon having a title, the ſon could make no conveyance to Alves. Beſides, the conveyance made by the reſpondent's mother to MacCartney does not entitle him to the fee of the lands, but only to the rents and profits during his life, and to the heirs to be procreate betwixt them, &c. Even though there had been a title in the perſon of Gilbert Mac Cartney, yet William his ſon had no right; for Agnes Mac Cartney, daughter of the firſt marriage, who was a Proteſtant, was ſerved heir to her father, and thereby the right eſtabliſhed in her perſon, and ſhe conveyed the ſame to the reſpondent. The reſpondent, therefore, had an undoubted title to call in queſtion any conveyance that could be made by any of them.

The words of the act 1700 are expreſs "That no perſon profeſſing the Popiſh religion, paſt the age of fifteen years, ſhall "be capable to ſucceed to any perſon whatſoever." This is in other words to ſay, "That no Papiſt ſhall hereafter be capable to "*ſerve as heir*, to any perſon whatſoever," becauſe till ſuch ſervice, the eſtate is not fully veſted in the perſon ſucceeding. And therefore it follows, that though the perſon laſt ſeiſed died before the act 1700, yet the next in ſucceſſion *not being ſerved heir* before that time, he was rendered incapable to ſerve after the paſſing of that law.

Nor

Nor can there be any *bona fides* in this caſe; for if William MacCartney's right be null, the title flowing from him can be no better; eſpecially where the appellant is not a purchaſer on the faith of any thing upon record, but is only purchaſer of a right *remaining perſonal* from an apparent Popiſh heir, who died without eſtabliſhing any title in his perſon. And, beſides, in this caſe the appellant, before his purchaſe, had notice of the reſpondent's claim, and of his ſerving heir to his grandfather.

The act 1700 alſo enacts, "that if any perſon or perſons educate in the Popiſh religion ſhall happen to ſucceed as heirs to "their predeceſſors, or any conveyance ſhall happen to be made "in their favour from a perſon to whom they might ſucceed as "heirs before they attain the ſaid age; then and in either of "theſe caſes, they ſhall be holden and obliged to purge themſelves of Popery before they attain the age of 15 years, by the "formula" therein mentioned. "And if they *neglect or omit* to "renounce Popery as aforeſaid, then and immediately thereafter "their right and intereſt ſhall become void and null, and ſhall "devolve and belong to the next Proteſtant heir or heirs," &c. By the words "educate in the Popiſh religion," is meant, one reſiding in a family with his Popiſh parents, under their influence, inſtruction, and example. This was the caſe of William MacCartney; all his right to the eſtate devolved to him before his age of 15, and it is proved, that he was born of Popiſh parents, and lived in the family with them till he was 15 years of age; that he was habite and repute a Papiſt during his abode in Britain, which was till his age of 21 years, and it did not appear that he ever took the formula.

Nothing is more certain, than that inquiry may be made even after the death of the perſon whoſe right is voided, whether he was in his lifetime under the incapacity mentioned in the ſaid act. And there was no neceſſity for *requiring* William MacCartney to take the *formula*; for the act 1700 declared, that if he *neglected or omitted* (not if he *refuſed*) to take the *formula*, his right ſhould be null, and ſhould devolve upon the next Proteſtant heir. The appellant, therefore, ſhould have proved that MacCartney did renounce Popery in terms of the act; but this he did not ſo much as attempt.

The act 3 G. 1. c. 18. relates only to diſabilities ariſing from the acts concerning Papiſts in England; but has no reference to the acts of parliament in Scotland. Beſides, the appellant has not made the leaſt proof of any valuable conſideration given for his purchaſe.

Nor can the appellant derive any advantage from the deciſion in the former appeal; that was merely a queſtion between the reſpondent and his mother, and younger brother, a Papiſt, in whoſe favour the mother wiſhed to diſinherit the reſpondent. It conſiſted ſolely of this point, Whether the reſpondent had a right to the premiſes during the lifetime of his mother? for the ſeveral conveyances were only held in truſt for the roſpondent's younger brother; and though the premiſes were then adjudged to the

in conſideration of ſuch releaſe by Dame Helenor, bound himſelf to pay her 2500 merks Scots *per annum* for her life in caſe ſhe ſhould ſurvive him.

On the 19th of Auguſt ſame year, Dame Helenor, by a deed reciting, that it was agreed between Sir John Schaw the father, and Dame Helenor his wife, that ſhe ſhould renounce her right to the houſehold furniture, the acquired eſtate, and other proviſions made for her by the marriage ſettlement; and alſo that ſhe ſhould make a ſettlement of her eſtates of Carnock and Plain to herſelf in life-rent, and to the appellant her ſon in fee, ſubject to a power to Dame Helenor to burden the ſame with any ſum not exceeding 50,000 merks Scots; and that Sir John the father ſhould oblige himſelf and his heirs to pay her an annuity of 8000 merks Scots ſo long as ſhe ſhould continue his widow; therefore releaſed all the proviſions made for her by her marriage contract, and ſettled her part of the eſtates of Carnock and Plain accordingly. And of ſame date, Sir John the father with the conſent of the appellant, by his bond reciting the laſt-mentioned deed, and in conſideration thereof, obliged himſelf and his heirs to pay to Dame Helenor an annuity of 8000 merks, ſo long as ſhe ſhould continue his widow. To both theſe deeds Preſident Dalrymple was a ſubſcribing witneſs.

Sir John the father died in 1702, leaving the appellant and reſpondent, his only children: and Dame Helenor afterwards remained a widow during her life. After the father's death, diſputes aroſe between the appellant and his mother, on the queſtion whether ſhe was entitled to the annuity of 2500 merks, contained in the deed of March 1700, or to the annuity of 8000 merks contained in the bond of 19th Auguſt 1700. In 1709 ſhe brought her action againſt the appellant, for this laſt-mentioned annuity, before the Court of Seſſion to this action the appellant appeared, but the cauſe was delayed for ſome time by his inſiſting on his privilege of parliament.

The appellant afterwards brought an action for reduction of the ſaid bond of 19th Auguſt 1700, upon the ground that the ſettlement of the eſtates of Carnock and Plain, which was the valuable conſideration for the ſame, did not exiſt; and in his libel he ſet forth, "that the lady did at diverſe times declare before ſeveral "witneſſes, and particularly upon the 7th of June 1702, that ſhe "had cancelled that diſpoſition ſome days before ſhe was "delivered of a poſthumous child; and that when ſhe did ſign "the ſaid diſpoſition, it was retained in her cuſtody, and ſhe then "declared, that ſhe would conſider theſe deeds further, and if "they did not pleaſe her, ſhe would tear them." Dame Helenor denied that ſhe had cancelled the deed, but that the ſame was abſolute and irrevocable on her part; ſhe alſo offered to execute a new deed to the ſame effect, or to prove the tenor of the original ſettlement. She accordingly brought an action for proving the tenor of the deed, which ſhe alleged was cancelled by accident, and in her libel ſet forth the words thereof at length. To this action the appellant pleaded, that it was not competent to prove

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reſpondent's mother, in preference to him, ſtill he is not thereby precluded from inſiſting in the preſent queſtion after her death.

Journal, 16 Feb. 1725-6. After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the ſeveral interlocutors or decrees therein complained of be affirmed.*

For Appellant, *C. Wearg. Dun. Forbes. Cha. Erſkine.*
For Reſpondent, *C. Talbot. Will. Hamilton.*

In this caſe both parties enter into a diſcuſſion of the proof led of Wm. MacCartney's Popery; but nothing can be diſtinctly ſtated thereon.

Caſe 126. Sir John Schaw, of Greenock, Bart. - *Appellant;*

Dame Margaret, the Widow of Sir John Houſton, Bart. Siſter of the Appellant - *Reſpondent.*

2d *April* 1726.

Preſumption.—Intromiſſion with the Settlements of a Perſon deceaſed.—Proof.—In a reduction of a mother's ſettlements brought by her ſon and heir, againſt a ſiſter, who was benefited by them, on the ground that the ſiſter had acceſs to the repoſitories of the deceaſed, and took what ſhe choſe, and might have deſtroyed the reſt; the ſiſter ſtated in defence that the deeds had been given to her by her mother: it was neceſſary for the purſuer to prove that the defender's intromiſſion was unwarrantable.

The deeds produced were preſumed to contain the laſt will of the deceaſed.

A circumſtantial proof, brought by the purſuer, that the deceaſed had declared that ſhe had made other ſettlements, and of embezzlement on the part of the defender, found inſufficient.

BY a contract, executed in April 1677, previous to the marriage of Sir John Schaw and Helenor Nicholſon, the father and mother of the appellant and reſpondent, in conſideration of the then intended marriage, and of the portion of Dame Helenor, (which was very conſiderable), the lands of Eaſter Greenock were ſettled upon her in life-rent, for her jointure; and ſhe was likewiſe provided to the life-rent of one-third of all the real eſtate, which ſhould be acquired by Sir John during the marriage, and to one-third of all the houſehold furniture.

After the marriage, the lands of Carnock and Plain deſcended to the ſaid Dame Helenor and her two ſiſters, as heirs portioners; the yearly value of the whole being about 833*l.* 6*s.* 8*d.* ſterling.

By articles of marriage, in March 1700, between the appellant and Margaret, the daughter of Sir Hugh Dalrymple, Preſident of the Seſſion, it was agreed that the ſaid lands of Eaſter Greenock ſhould be ſettled upon the appellant and his then intended wife; and accordingly Dame Helenor releaſed the ſame of her life-rent By another deed, of ſame date, Sir John, the father,

in

in conſideration of ſuch releaſe by Dame Helenor, bound himſelf to pay her 2500 merks Scots *per annum* for her life in caſe ſhe ſhould ſurvive him.

On the 19th of Auguſt ſame year, Dame Helenor, by a deed reciting, that it was agreed between Sir John Schaw the father, and Dame Helenor his wife, that ſhe ſhould renounce her right to the houſehold furniture, the acquired eſtate, and other proviſions made for her by the marriage ſettlement; and alſo that ſhe ſhould make a ſettlement of her eſtates of Carnock and Plain to herſelf in life-rent, and to the appellant her ſon in fee, ſubject to a power to Dame Helenor to burden the ſame with any ſum not exceeding 50,000 merks Scots; and that Sir John the father ſhould oblige himſelf and his heirs to pay her an annuity of 8000 merks Scots ſo long as ſhe ſhould continue his widow; therefore releaſed all the proviſions made for her by her marriage contract, and ſettled her part of the eſtates of Carnock and Plain accordingly. And of ſame date, Sir John the father with the conſent of the appellant, by his bond reciting the laſt-mentioned deed, and in conſideration thereof, obliged himſelf and his heirs to pay to Dame Helenor an annuity of 8000 merks, ſo long as ſhe ſhould continue his widow. To both theſe deeds Preſident Dalrymple was a ſubſcribing witneſs.

Sir John the father died in 1702, leaving the appellant and reſpondent, his only children: and Dame Helenor afterwards remained a widow during her life. After the father's death, diſputes aroſe between the appellant and his mother, on the queſtion whether ſhe was entitled to the annuity of 2500 merks, contained in the deed of March 1700, or to the annuity of 8000 merks contained in the bond of 19th Auguſt 1700. In 1709 ſhe brought her action againſt the appellant, for this laſt-mentioned annuity, before the Court of Seſſion to this action the appellant appeared, but the cauſe was delayed for ſome time by his inſiſting on his privilege of parliament.

The appellant afterwards brought an action for reduction of the ſaid bond of 19th Auguſt 1700, upon the ground that the ſettlement of the eſtates of Carnock and Plain, which was the valuable conſideration for the ſame, did not exiſt; and in his libel he ſet forth, "that the lady did at diverſe times declare before ſeveral "witneſſes, and particularly upon the 7th of June 1702, that ſhe "had cancelled that diſpoſition ſome days before ſhe was "delivered of a poſthumous child; and that when ſhe did ſign "the ſaid diſpoſition, it was retained in her cuſtody, and ſhe then "declared, that ſhe would conſider theſe deeds further, and if "they did not pleaſe her, ſhe would tear them." Dame Helenor denied that ſhe had cancelled the deed, but that the ſame was abſolute and irrevocable on her part; ſhe alſo offered to execute a new deed to the ſame effect, or to prove the tenor of the original ſettlement. She accordingly brought an action for proving the tenor of the deed, which ſhe alleged was cancelled by accident, and in her libel ſet forth the words thereof at length. To this action the appellant pleaded, that it was not competent to prove the

the tenor of a deed without firſt proving and particularifing the *caſus amiſſionis*; that Dame Helenor muſt be preſumed to have been the deſtroyer of the Deed, becauſe it bore not to have been delivered, and muſt be preſumed to have remained in her cuſtody, in order to its being ratified if ſhe thought fit; and that it never was ratified by her. With regard to the propoſal to renew the deed, Sir John ſtated, that the original being cancelled, the grant of the annuity was alſo cancelled; and that by the cancelled deed as ſet forth in the libel Sir John the father had concurred in ſeveral grants and proviſions in favour of his ſon, which could not be reſtored by Dame Helenor's act or deed.

The Court on the 19th of July 1711, "Found that Dame "Helenor having the diſpoſition cancelled in her hands, and "never ratifying the ſame judicially, preſumed in law that it was "cancelled by herſelf, and therefore that the obligements on Sir "John by the bond are diſſolved." Againſt this interlocutor, Dame Helenor next day entered her proteſt for *remeid* of law; but preſented no appeal to the Houſe of Lords.

Sir John afterwards offered to refer it to the oath of his mother's counſel, whether they had not ſeen the cancelled deed in her cuſtody; but having declined to depone, the Court on the 25th of July 1711, "In reſpect that in the debate Dame Hele-"nor's having the cancelled diſpoſition in her cuſtody was not "refuſed, and that her advocates refuſed to appear to give their "oaths of calumny becauſe of the appeal interpoſed, aſſoilzied "the ſaid Sir John Schaw (*a*)."

Dame Helenor proſecuted her appeal no further; but on the 6th of September 1711, ſhe executed five ſeveral deeds for a ſettlement of her eſtate and effects, while ſhe had in view the endeavouring to obtain a reverſal of the decree of the Court of Seſſion. Three of theſe deeds were executed to take effect in the event of the decree being reverſed, and were of the following nature: Firſt, a diſpoſition of her ſhare of the eſtate of Carnock and Plain, to herſelf in life-rent, and to the appellant her ſon in fee, reſerving a power to charge the ſame with 50,000 merks Scots, and providing that the diſpoſition ſhould be void, if ſhe ſhould not be found entitled to the ſaid annuity of 8000 merks, or in caſe the appellant ſhould not pay her the ſame: Second, an aſſignation to the reſpondent of all the arrears of the ſaid annuity due and to become due, ſubject to a power of revocation: and third, a deed charging the ſaid eſtate with the payment of 49,000 merks to the reſpondent, purſuant to the reſervation for that purpoſe.

The two other deeds were executed to take effect in caſe ſhe ſhould be found to have no right to the annuity of 8000 merks, and were of the following nature: Firſt, a ſettlement by way of entail of the ſaid eſtate of Carnock and Plain to herſelf in life-rent, and to the reſpondent her daughter and the heirs of her body; whom failing, to ſuch perſons as Dame Helenor ſhould

(*a*) Theſe two interlocutors were the ſubject of the ſubſequent appeal, at Lady Houſton's inſtance, againſt Sir John Schaw, No. 128. of this collection, to which appeal the foregoing ſtatement of facts and precedents is an introduction.

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appoint by any writing under her hand; whom failing, to her own heirs and aſſignees: and ſecond, an aſſignation to the reſpondent of the proviſions in the marriage-contract in Dame Helenor's favour, particularly the arrears of the life-rent of 2500 merks ſecured to her, upon her renouncing her jointure out of the eſtate of Eaſter Greenock.

All theſe deeds contained powers of revocation, and none of them were delivered or put upon record, but the whole were retained in Dame Helenor's own cuſtody. No alteration was made upon theſe ſettlements till about a month before Dame Helenor's death. On the 26th of February 1722, ſhe executed an aſſignation of all her perſonal eſtate in favour of the reſpondent, ſubject to the payment of ſuch debts and legacies as ſhe ſhould at any time give, with a power of revocation. On the 3d of March thereafter, ſhe executed a deed reciting the former ſettlement of the eſtates of Carnock and Plain in 1711, and that the ſame was ſubject to a power of revocation; therefore ſhe ſo far varied it, as to ſettle the ſame upon the deceaſe of the reſpondent, and failure of heirs of her body upon Mrs. Maria Schaw, daughter of the appellant, and the heirs of her body, with ſeveral other ſubſtitutions of heirs, the laſt of them being to her own heirs whatſoever; and ſhe directed, that this ſhould be conſidered as part of the former deed 1711. Of ſame date ſhe executed an aſſignation to the reſpondent of the arrears of the ſaid annuity of 2500 merks: and the reſpondent executed a back bond, obliging herſelf to apply all the money ſhe ſhould receive of this laſt-mentioned annuity in the purchaſe of lands to be ſettled in the ſame manner as the ſaid eſtate of Carnock and Plain was. On the 5th of March ſhe executed in favour of the appellant's grand-daughter Miſs Helenor Cathcart an aſſignment of ſeveral bonds to the amount of 2000 merks; and about the ſame time ſhe aſſigned to Mrs. Helenor Houghton, the reſpondent's daughter, a bond of 500*l.* ſterling. All theſe deeds executed by Dame Helenor contained powers of revocation, and clauſes diſpenſing with the delivery. She died on the 20th of ſaid month of March 1722; and it came to be a queſtion between the parties, which is the ſubject of the preſent appeal, whether Dame Helenor had not of a date ſubſequent to the ſettlements laſt mentioned, executed other deeds, conveying her eſtate, particularly the eſtate of Carnock and Plain, to the appellant.

Immediately after Dame Helenor's death, one of the baillies of Edinburgh, where ſhe died, came and ſealed up the preſſes, cabinets, and repoſitories, at the deſire of the appellant. But when theſe were opened, the only deed that was found was the aſſignation in favour of Miſs Helenor Cathcart, the appellant's grand-daughter, executed on the 5th of March 1722.

The appellant thereupon commenced an action of exhibition *ad deliberandum* before the Court of Seſſion, againſt the reſpondent; and the reſpondent produced all the deeds before mentioned conceived in her favour. The appellant afterwards brought an action of reduction and declarator againſt the reſpondent, to have all theſe deeds

deeds ſet aſide, on the ground, that the reſpondent had illegally and unwarrantably poſſeſſed herſelf of her mother's keys, and of her mother's ſtrong box, in which ſhe kept her deeds and writings; and that ſhe had carried away theſe deeds and writings out of the houſe two days before her mother's death; which, it ought to be preſumed, were done without her mother's conſent: and that the reſpondent having had it in her power to preſerve what might be for her intereſt, and to deſtroy what was not ſo, ſhe had rendered her mother's will uncertain, therefore all the deeds executed in her favour ought to be declared void; or, the ſame being ſubject to a power of revocation, it ought to be preſumed they were revoked; and the whole real and perſonal eſtate ought to be decerned to the appellant.

To this action the reſpondent ſtated as her defence, that what ſhe had done was by her mother's authority; that ſhe poſſeſſed herſelf of no deeds but which appeared to be properly belonging to her, and which, being in her cuſtody, muſt be preſumed in law to have been delivered to her; and that the mother had never altered or ſhewed any intention to alter any of theſe deeds. The Court, in July 1723, allowed both parties to prove their allegations, and many witneſſes were examined.

The import of the proof appears to have been (for it cannot be diſtinctly ſtated on either ſide) that three nights before the old lady's death, the reſpondent's lawyer and agent were brought by her into the houſe, and the ſeveral deeds then carried away: no direct authority from the mother herſelf was proved for this: female witneſſes about the perſon of the deceaſed ſwore that before her death, ſhe had declared that ſhe had ſettled all affairs between her children; that ſhe had forgiven the appellant of all her claims, and even given him a *gripe* of the eſtate of Carnock; ſhe mentioned too that ſhe had left legacies to the miſtreſs of Cathcart and to Colonel Cathcart, &c. and a donation to the poor of the pariſh, but none of thoſe appeared.

On the part of the reſpondent it was proved by the writers and witneſſes of the deeds which appeared, that they knew of no other deeds having been executed; and in a condeſcendence, given in by her, ſhe denied all the allegations of the appellant. The cauſe coming to be heard, the Court, on the 22d of June 1725, "Found, that it was not proven, that the reſpondent's "intromiſſion with her mother's ſtrong box and writings was unwarrantable."

The appellant reclaimed, and after anſwers for the reſpondent, the Court, on the 20th of July 1725, "Found that the deeds in "favour of the reſpondent, and of Mrs. Helenor Cathcart, and "Mrs. Helenor Houſton, are preſumed to contain the laſt will "of the deceaſed concerning her ſucceſſion; and that no evi"dence ariſes from the proof adduced by the appellant, that the "deeds in favour of the reſpondent were altered or revoked in "his favour; or that the deceaſed concealed or embezzled any "of the deceaſed's writings; and therefore aſſoilzied the re"ſpondent from the reaſons of reduction inſiſted on."

The

The appeal was brought from "an interlocutory order of the 22d of June 1725, and an order or decree of the 20th of July following, made by the Lords of Seſſion." Entered 25 Jan. 1725-6.

Heads of the Appellants' Argument.

Though evidence of the kind adduced by the appellant be not *per ſe* abſolute and concluſive, yet when the reſpondent, by her clandeſtine and unwarrantable intromiſſion, rendered the will of the deceaſed uncertain, conjectural evidence and preſumptions muſt ſupply the place of direct proof: nothing could be eaſier than for the reſpondent to prevail on the writer and witneſſes of the papers which muſt have been executed not to offer a diſcovery voluntarily.

The reſpondent inſiſted, that it was unnatural to ſuppoſe, that a ſettlement, the work of ſo many years, and in which it appears that the old lady had perſiſted till the 3d of March, 17 days before her death, ſhould have been altered in the remaining ſhort term of her life; at leaſt that it was not to be believed without direct evidence. But this general obſervation did not militate againſt the appellant; the laſt of the deeds in favour of the reſpondent was dated on the 3d of March before Dame Helenor's death, and the only one produced in the appellant's favour was dated on the 5th of March, two days later: as that alteration was made, in thoſe two days, the remaining period of the old lady's life left time enough for the other alterations.

Heads of the Reſpondent's Argument.

The ſeveral deeds in favour of the reſpondent were really and truly executed by her mother, at the reſpective times they bear date, and the latter of them, which confirmed the former one, executed ſo ſhort a time before the lady's death, that there can be no foundation for preſuming that any alteration was made.

By the law of Scotland, it is not neceſſary to prove the actual delivery of any deed; but if it be out of the poſſeſſion of the grantor, it is preſumed to have been lawfully delivered, unleſs it be proved, that the perſon poſſeſſed of ſuch deed came by it in an unwarrantable manner.

No proof was made of giving inſtructions to revoke any of thoſe deeds, or to prepare others in favour of the appellant. Deeds ſolemnly executed, cannot, without ſhaking the ſecurities of all property, be ſet aſide on pretence of ſuch ſlender evidence of words ſpoken, at beſt ambiguous in themſelves, or upon pretended preſumptions, without any real foundation on facts.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutory order and decree therein complained of be affirmed.* Judgment, 2 April, 1726.

For Appellant, *Dun. Forbes. C. Talbot.*
For Reſpondents, *C. Wearg. Ro. Dundas. Will. Hamilton.*

Caſe 127. Major Thomas Cochrane - - *Appellant;*
Robert Lord Blantyre - - - *Reſpondent.*

4th *April* 1726.

Coſts and Expences.—Truſt bonds granted conditionally, if the grantor ſhould procure two commiſſions held by the grantee, of which he then executed reſignations, are reduced upon the ground, that though the grantor held the ſaid reſignations in his hands, he did not procure the new commiſſions in virtue thereof, but in conſequence of other means and conſiderations: but the Court having refuſed the purſuer his coſts, the judgment is reverſed, and it is ordered that the Court do cauſe theſe coſts to be taxed and aſcertained and forthwith paid to the purſuer.

Appeal.—The purſuer having craved that the bonds might be delivered up to him by the clerk, but the defender having ſtated that he meant to appeal, and the Court having ordered the bonds to remain in proceſs, and not to be delivered up without a freſh warrant, their judgment is affirmed.

THE reſpondent being captain in a regiment of foot, commanded by General Whetham, and fort-major of Fort St. Philip in Minorca, in 1715, upon the death of his elder brother Lord Blantyre, left that iſland and returned to Great Britain. On the 9th of March 1715, the appellant and reſpondent bargained together for the ſaid two commiſſions; the reſpondent put into the appellant's hands two ſeveral *demiſſions* of the ſame; and the appellant granted two bonds to the reſpondent for the agreed price, both dated the 10th of March 1715. The bond for the company run in the following terms: "I Cornet Thomas Cochrane, of the Royal Gray Dragoons, foraſmuch as Robert Lord Blantyre has, by his demiſſion of the date the 9th inſt. demitted and reſigned in my favour his poſt as captain in General Whetham's regiment of foot; therefore I hereby bind and oblige me, my heirs and ſucceſſors, to make payment to the ſaid Robert Lord Blantyre, his heirs, executors, and aſſignees, the ſum of 600*l.* ſterling money, and that immediately and how ſoon a commiſſion ſhall be iſſued in my favour upon the aforeſaid demiſſion." The other, with regard to the fort-majority, was to the ſame purpoſe, with this variation, that the ſum thereby to be paid was 300*l.* in ſix months after the iſſuing a commiſſion in the appellant's favour for the ſaid poſt of fort-major, upon the reſpondent's demiſſion.

The appellant ſoon after did procure a company in the ſaid regiment, not that which the reſpondent had held, but one vacant by the promotion of a Captain Cope, whereas a Captain Stammers ſucceeded the reſpondent in his company. For the commiſſion obtained by the appellant he paid 800*l.* to Captain Cope; the new commiſſion was ſigned by the king upon the 23d of January 1716; and the appellant, on the 25th of December preceding, got a commiſſion to be fort-major of Fort St. Philip. But diſputes ariſing between the parties as to the means by which the appellant obtained theſe two commiſſions, he brought an action againſt the

the reſpondent before the Court of Seſſion to reduce the ſaid two bonds, upon this ground, that the condition on which they were to be paid, was, that the appellant ſhould obtain the commiſſions upon the reſpondent's demiſſions, and that ſuch condition had not taken place. The reſpondent brought his counter action againſt the appellant for payment of the ſums contained in the bonds; and theſe two actions were conjoined.

The appellant on his part ſtated, that the reſpondent had been ordered to his poſt by the governor of Minorca, and, upon his diſobedience of orders, he was diſmiſſed the ſervice: that his company was given to a Captain Stammers in October 1715, and the appellant thereupon entered into a treaty for the purchaſe of Major Cope's company, for which he paid 800*l.*; and that he obtained his commiſſion as fort-major, after the reſpondent had been diſmiſſed the ſervice, upon the ſolicitations of his own friends.

The reſpondent on the other hand, contended, that the appellant having got theſe two demiſſions from the reſpondent, and having ſoon after obtained his two commiſſions, it ought to be underſtood, that he got them by virtue of the two demiſſions; eſpecially ſince the appellant never returned them, nor intimated to the reſpondent that they had not been accepted.

Various witneſſes were examined in this matter; by the evidence of General Whetham, Major Cope, and Captain Stammers, relative to the captain's commiſſion, it appeared, that Captain Stammers paid nothing for the commiſſion granted to him, then an officer on half pay, and that Major Cope had received 800*l.* for his company. Relative to the commiſſion as fort-major, Sir Anthony Weſtcombe, ſecretary to the then governor of Minorca, deponed, that he wrote two letters in 1715 to the reſpondent to attend the ſervice in Minorca, in one of which was incloſed a letter from the governor, informing him that he would be diſmiſſed if he did not return to his duty; and that accordingly about the 5th of June 1715 the governor wrote a letter to the then ſecretary at war, to move his majeſty for a commiſſion to the appellant as fort-major.

The Court, on the 17th of July 1725, "Found it to be preſumed, that the appellant purchaſed the company with his own proper money, and that the reſpondent's proof did not take off that preſumption: and found it likewiſe to be preſumed that the appellant obtained the fort majority upon the reſpondent's being diſmiſſed from the ſervice, and not upon his demiſſion; but reſerved the conſideration till next hearing how far the appellant was in *bona fide* to accept of a commiſſion in the above terms, on the ſuppoſition that he was employed to negotiate the demiſſion for the reſpondent."

After a hearing upon this reſerved point, the Court, on the 22d of July, "Found it not relevant to make the appellant pay the 300*l.* contained in the bond relative to the fort-majority, that he did procure a commiſſion to be fort-major gratuitouſly after the reſpondent was diſmiſſed the ſervice,

"even

" even though he had the demiſſion in his cuſtody, an
" not acquainted the reſpondent of the way he obtained th
" commiſſion; and, therefore, and upon the grounds in
" former interlocutor, reduced the ſaid two bonds, and decer
" *but refuſed to allow the appellant his expences.*" Of theſ
pences he had preſented an account, amounting to 217*l.* 19
ſterling.

The appellant afterwards applied by petition to the C
praying, that the bonds might be delivered up by the cle
court to be cancelled by the appellant; but the reſpondent h
ſtated in anſwer, that he intended to appeal to the Houſe of
from the decree of reduction, the Court on the 30th of July
" Ordained the bonds to remain in the proceſs, and not
" delivered up to either party without a warrant."

Entered, 28 Jan. 1725-6. The appeal was brought from " ſo much of an interlocu
" the Lords of Seſſion of the 22d of July 1725, whereby
" refuſed to allow the appellant his expences; as alſo fr
" interlocutor of the 30th of the ſame July."

Heads of the Appellant's Argument.

It is againſt all law and reaſon to deny a party his full
when by the wilfulneſs of his adverſary, he is put to extraor
charge.

Expences and coſts of ſuit are more particularly to be al
where the fact conteſted is preſumed to be conſiſtent w
knowledge of the party who conteſts it. Now it appears
evidence of Sir Anthony Weſtcombe, that many months
the appellant had either of the commiſſions, the reſponde
ordered by repeated letters in March and May 1715 to re
his poſt, and acquainted that if he did not, he would be di
the ſervice.

The refuſal to give up the bonds upon the reſpondent
tending that he purpoſed to carry on an appeal, is unpreced
and may be attended with bad conſequences: nothing le
an order of the Houſe of Lords, upon a petition and appeal
ſerved upon the reſpondent, can ſtay proceedings upon any
ment or decree of the courts of juſtice.

Heads of the Reſpondent's Argument.

As the appellant was purſuer in the action of reductior
reſpondent had good reaſon to defend it, until at leaſt it
be proved, that the appellant got the commiſſions ſome othe
than in purſuance of the demiſſions given him by the reſpon
and until it was proved, that the reſpondent was diſmiſſe
majeſty's ſervice, and that his demiſſions were not accepte
the proof lay upon the appellant. As he was to make out
which the reſpondent had no knowledge of, and had no reaſ
believe, ſince the appellant did not inform him of them, it
unreaſonable, though the proof had been ever ſo clear, to
charged the reſpondent with expences. But the proof is ſ
from being clear, that the Judges do not find the fact proved,

ly that it was presumed to be as the appellant stated it, from
: evidence which was brought. The decree in favour of the
ellant reducing the bonds, is equal to a discharge; and so long
that decree stands unimpeached, no benefit can be made of
se bonds against the appellant, and they are equally safe for
h parties, when in the custody of the Court, and not to be de-
red out without a warrant.

After hearing counsel, *It is ordered and adjudged, that so much the interlocutor of the 22d of July 1725, as is appealed from, reversed; and it is further ordered and adjudged, that the Lords of hon do cause the appellant's costs and expences to be taxed and ascer-ned; and that the same, when so taxed and ascertained, be forth-th paid to the appellant by the respondent: And it is further or-red, that the other interlocutor complained of in the said appeal affirmed.* Judgment 4 April 1726.

For Appellant, *Dun. Forbes.* *C. Talbot.*
For Respondent, *Ro. Dundas.* *Will. Hamilton.*

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ame Margaret Houston, Widow of Sir John Houston, Bart., Assignee and Exe-cutrix of Dame Helenor Schaw, the Mother of the Appellant and Respondent, *Appellant;*
r John Schaw, Bart. - - - *Respondent.*

Case 128.
Forbes, 5 Jan. 22 June 1709. 19 July 1711.

20th *April* 1726.

Proving the Tenor.—Presumption.—Mutual Obligation.—In an action by a mother against a son for proving the tenor of a deed executed by her during her husband's life, it is found that the pursuer's having the disposition cancelled in her hands, and never ratifying the same judicially, presumed that it was cancelled by herself.

This cancelling dissolved the obligations of a bond, granted by her husband in consideration of said disposition.

In regard the pursuer's counsel did not deny that the cancelled deed was in her hands, and refused to give their oaths of calumny thereon, the defender is assoilzied.

Costs and Expences.—These interlocutors pronounced in 1711, are appealed from after the death of the pursuer, by her daughter and executrix, but are affirmed with 50*l.* costs.

N the process between Dame Helenor, and the respondent, relative to the annuity of 8000 merks claimed by her, d the proving of the tenor of the bond, by which the same was anted to her, which are fully stated in the other appeal, between e present parties (No. 126 of this collection), the Court of Ses-n, on the 19th of July 1711, "Found that Dame Helenor having the disposition cancelled in her hands, and never ratify-ing the same judicially, presumed in law, that it was cancelled by herself, and therefore that the obligements on Sir John by

" the laid Sir John Schaw."

Entered, 25 Jan. 1725-6.

The appeal was brought by the appellant as e mother from " two decrees of the Lords of Se " 19th and 25th days of July 1711."

Heads of the Appellant's Argument.

The bond for payment of the annuity of 8000 by Sir John Schaw the father, with conſent of the ſon, was for a full and valuable conſideration, g of executing that bond, equal to the annuity, *be* ment Dame Helenor made of her eſtate of Carno favour of the reſpondent, at ſame time, and as a p ſideration of the annuity.

The ſettlement in queſtion never was produced, not appear whether it was ratified or not, if that ſary: nor was any proof made or attempted to ſ cancelled, much leſs that it was cancelled by No inference ought to be drawn from her counſel' to anſwer upon oath: this was an unuſual procee not to have been allowed. Their reaſon for not becauſe, after the interpoſing of the proteſt for *re* appearing at any further proceeding in that court conſtrued as a paſſing from the appeal. Beſides, whether the cancelled deed was in Dame Helenor it might have come to her accidentally after her h or ſhe might have recovered it from the cuſtody and have ſhewn it to her counſel, to be adviſed as t effect of it: therefore, though her counſel had ſeen cancelled, it would have been no evidence that by her. Dame Helenor, in the whole courſe of t lutely denied that ſhe had cancelled the ſaid ſettler fore it was not, as the appellant conceives, con rules of juſtice or equity to preſume that ſhe had

Heads of the Reſpondent's Argument.

Though by the accident of the old lady's living, and not marrying again, the cancelling of the conveyance came to be of no conſequence: yet if ſhe had died, or married a ſecond time ſoon after her firſt huſband's death, the conſequence would have been no leſs than the loſs of the fee of the eſtate of Carnock and Plain to the reſpondent, which, the diſpoſition being cancelled, he then could not claim. The act, therefore, that cancelled that diſpoſition, defeated the annuity dependant upon it; and nothing can be more unequal than to ſuppoſe in the old lady a power of defeating her own deed by cancelling it, and at ſame time of preſerving the obligation to pay the annuity which was the conſideration for making it, and renewing the ſame diſpoſition at the diſtance of many years, when the growth of thoſe annuities made it advantageous to claim them.

But in reality the appellant is not properly entitled to carry on this appeal; her right to do ſo is dependant upon the deed in 1711, which was revocable, and was in effect revoked by the deeds of 3d March 1722, the final ſettlement of the old lady's eſtate, whereby ſhe ſettled her whole real and perſonal eſtate, upon a certain line of heirs of entail, and conſidered nothing to be her eſtate but the lands of Carnock and the annuity of 2500 merks. Theſe, containing the laſt will and ſettlement of the deceaſed, muſt be conſidered as a revocation of the former conditional grant of the annuity of 8000 merks, made by her when ſhe was out of humour at the decree of the Court of Seſſion, and when ſhe intended to proſecute an appeal, a purpoſe that in the remaining courſe of her life ſhe never took any ſtep to proceed with, and conſequently muſt be preſumed to have relinquiſhed upon after-thoughts.

After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the decrees therein complained of be affirmed: and it is further ordered, that the appellant do pay, or cauſe to be paid to the reſpondent, the ſum of 50l. for his coſts, by reaſon of bringing the ſaid appeal.* Judgment, 2 April 1726.

For Appellant, *P. Yorke.* *Will. Hamilton.*
For Reſpondent, *Dun. Forbes.* *C. Talbot.*

Caſe 129. Kaims, 26 Jan. 1726. Nos. 70, 71, 72, 73, 74.

James Marquis of Clydeſdale, an Infant of tender Years, by James Duke of Hamilton and Brandon his Father - - - *Appellants*;

Thomas Earl of Dundonald - - - *Reſpondents*.

Et e contra.

2d *April* 1726.

Minor.—A minor, though with conſent of his curators, could not gratuitouſly alter the ſettlements of his eſtate

Death-bed.—Neither could he gratuitouſly alter them on death-bed.

Tailzie.—A tailzie executed in 1716, not regiſtered in the Regiſter of Tailzies, ſuſtained in 1725 as a title on which to ſerve heir of proviſion.

Return.—A clauſe of return to the grantor of a deed after failure of heirs male, did not diſable the heir in poſſeſſion gratuitouſly to alter in favour of his daughters.

Deſtination ſimple.—Nor did a ſimple deſtination to heirs male in ſeveral deeds hinder this.

Preſcription.—Baſe Infeftment.—Hæreditas Jacens.—A baſe infeftment is taken by a ſon on diſpoſitions from his father in 1653 and 1656. In 1680 the father, after the ſon's death, reſigns theſe lands by a procuratory of reſignation, and takes new charters from the crown, under which the lands are held till 1725, without making up titles under the ſon's baſe infeftment. The objection of preſcription is repelled. An objection that though the baſe infeftment contained lands in two counties it was only regiſtered in one, repelled. And it is found that theſe lands being ſtill in *hæreditate jacente* of the ſon, a title to them could only be made up by a ſervice to him.

Apparent Heir.—One paſſing by an apparent heir three years in poſſeſſion not liable to implement ſuch apparent heir's gratuitous bond of tailzie.

Conſtruction.—A deed is executed, by which the grantor obliges himſelf and his heirs male, and of tailzie, proviſion, &c. upon failure of heirs male of his own body, and *heirs male of the deſcendants of his body*, to reſign the ſame for infeftments to his daughters and the heirs male of their bodies without diviſion, &c.; in a competition between the heir male of the body of his eldeſt daughter, and a perſon claiming as heir male of the deſcendants of his body, the former is preferred.

BY a contract, in September 1653, executed previous to the marriage of Wm. Cochran, eldeſt ſon of Wm. Lord Cochran, (afterwards created Earl of Dundonald,) with Lady Catherine Kennedy, daughter of the Earl of Caſſillis, the ſaid Wm. Lord Cochran obliged himſelf and his heirs to ſettle the lands of Ochiltree and Cochran, and others in the counties of Ayr and Renfrew, upon William the ſon, and the heirs male of the marriage; whom failing, to return to the ſaid Lord Cochran himſelf, and his heirs and aſſignees for ever; reſerving to himſelf his liferent of the whole lands, except the houſe of Ochiltree, and an annuity of 5000*l.* Scots for the ſon's maintenance during his father's life; and alſo reſerving a power to redeem all the ſaid eſtate, except the lands of Ochiltree and Trabrough, upon payment of ten merks Scots. This deed contained a procuratory of reſignation, and a precept of ſaſine; and after the marriage took place, the ſon took an infeftment on the precept of ſaſine, but took no ſtep in virtue of the procuratory of reſignation in procuring

curing new titles from the Crown the ſuperior. Part of the lands in which the ſon was infeft lay in the county of Ayr, and part in the county of Renfrew; but his ſaſine was only regiſtered in Ayrſhire.

In January 1656, a contract was executed between William Lord Cochran and William his ſon, whereby the ſon reconveyed to the father the lands of Ochiltree and Trabrough, in conſideration whereof the father conveyed the lordſhip of Paiſley, and other lands, to the ſon, and the heirs male of his ſaid marriage, whom failing, to return to the father, reſerving the father's life-rent, with the exception of ſome lands particularly mentioned, and with the exception of an annuity of 1000*l.* Scots, iſſuing out of part of the lands for the ſon's maintenance during his father's life. This contract alſo contained a procuratory of reſignation and precept of ſaſine; but as Lord Cochran was himſelf only infeft baſe under the perſon from whom he acquired theſe lands, he obliged himſelf to procure his own infeftment to be confirmed by the Crown the ſuperior. The ſon however only took a baſe infeftment under the precept of ſaſine.

A contract was afterwards executed, in 1657, betwixt the father and ſon, whereby Lord Cochran renounced the right of redemption reſerved to him in the ſettlement 1653, and in conſideration thereof the ſon obliged himſelf to give ſecurity for 20,000*l.* Scots to any of his father's creditors, or to grant bond for that ſum at his father's option: and accordingly in December 1658 he granted a bond to his father for that ſum.

The father afterwards in 1659 and 1662 obtained charters from the Crown of the lands contained in the before mentioned conveyances to his ſon, to him and his heirs and aſſignees whatſoever; upon which charters he was duly infeft. And he afterwards acquired other lands, the titles of which were taken to himſelf in life-rent, and to William his ſon, and the heirs male of his body in fee; but as to part of theſe purchaſes, particularly the lands of Kirkmichael and Dalmuir, the father reſerved a power to ſell and diſpoſe thereof, and to charge the ſame with debts at his pleaſure without conſent of the ſon. In thoſe new purchaſed lands, William the ſon took infeftment under the diſpoſitions thereof.

In 1669, William Lord Cochran was created Earl of Dundonald; and in 1679 William the ſon, then William Lord Cochran, died in the lifetime of his father, leaving iſſue John his eldeſt ſon and heir, and ſeveral other children. This John, now John Lord Cochran, made up no title to his father by ſervice.

In July 1680, the Earl of Dundonald executed a procuratory of reſignation as well of the lands which he poſſeſſed in fee ſimple, as of the lands in which his late ſon was infeft, proceeding upon the recital that "he was abſolute proprietor of the whole lands, "and had power reſerved to him, ſo far as concerned any of the "lands, wherein the deceaſed William Lord Cochran his ſon was "infeft in fee, to diſpone the ſame at any time in his life to any

" perſon he pleaſed, without conſent of his ſon:" He thereby obliged himſelf to reſign the whole lands " to and in favours of " John Lord Cochran his grandſon, and the heirs male of his " body; whom failing, to William Cochran his ſecond grandſon, " (father of the preſent Earl) and the heirs male of his body; " whom failing, to his 3d and 4th grandſons ſucceſſively, and the " heirs male of their bodies; whom failing, to the Earl himſelf, " and the heirs male of his body; whom failing, to his heirs " whomſoever, reſerving his own life-rent of the ſaid eſtate." It contains alſo this clauſe, " that the ſaid John Lord Cochran " the grandſon, and the other heirs therein ſubſtituted, ſhould be " obliged to pay and perform all the debts and deeds of the Earl, " and that he ſhould have power to ſell and diſpoſe of the ſaid " eſtate without conſent of his ſaid grandſon or the other heirs:" and it contained a power of revocation. A crown charter was in conſequence obtained in terms thereof, with an additional clauſe to this purpoſe, that " in caſe heirs female ſhould ſucceed, " the eldeſt ſhould exclude heirs portioners, and they and their " deſcendants ſhould aſſume the name of Cochran, and carry the " arms of the family of Dundonald, or otherwiſe ſhould loſe their " right of ſucceſſion." In virtue of this charter John Lord Cochran took infeftment in the lands therein contained.

In November 1684, by a contract executed previous to the marriage of John Lord Cochran with Lady Suſanna Hamilton, John Lord Cochran obliged himſelf to purchaſe and obtain himſelf infeft and ſeiſed as heir to the ſaid William Lord Cochran his father in all ſuch of the lands and others therein mentioned, as his father died laſt veſt and ſeiſed in, without any power to the ſaid Earl of Dundonald to diſpoſe thereof in his lifetime; as alſo to procure himſelf infeft in other lands therein mentioned, which had been purchaſed by the Earl of Dundonald, and conveyed to himſelf in life-rent, and to William Lord Cochran his ſon in fee (a); and the ſaid William Earl of Dundonald and John Lord Cochran thereby bound themſelves and their heirs to make reſignation of the whole lands aforeſaid for new infeftments thereof to be granted to the ſaid John Lord Cochran and the ſame ſeries of heirs ſpecified in the laſtmentioned charter, with the ſame clauſe relative to heirs female; and William Earl of Dundonald renounced and diſcharged all the faculties, powers, and liberties reſerved to him by the infeftments granted to John Lord Cochran, and the deceaſed William Lord Cochran his father, or either of them, and obliged himſelf to grant a ſeparate renunciation of the ſaid reſerved power; and John Lord Cochran obliged himſelf to do no act in prejudice of the heirs male of the marriage, reſerving always to him as fiar of the eſtate a liberty to contract debts, or to ſell or diſpoſe thereof for any other cauſe as he ſhould think fit. This contract alſo contained a proviſo, that the rights formerly granted by the earl to his ſon ſhould not imply the granting

(a) This contradicted the recital of the procuratory of July 1680, executed by the Earl of Dundonald.

double

double rights, nor ſubject him to double warrandice. The earl afterwards in terms of this contract, by a ſeparate deed renounced and diſcharged all the powers and faculties reſerved to him, either by the ſettlements upon William the ſon or John the grandſon, and ſuch renunciation was regiſtered in November 1684.

The earl died in 1685, and was ſucceeded in the honours by his ſaid grandſon John Lord Cochran. This Earl John in October 1688, executed a bond of tailzie, reciting that he intended to alter the order of ſucceſſion contained in the infeftments of his lands and eſtates, and obliging himſelf to ſurrender the ſame, to himſelf in life-rent, and to the heirs male of his body; whom failing, to the heirs female of his body, the eldeſt heir female ſucceeding without diviſion; whom failing, to his brothers ſucceſſively in their order, and the heirs male of their bodies; whom failing, to his own heirs whomſoever, the eldeſt heir female always ſucceeding without diviſion. This deed contained prohibitory, irritant, and reſolutive clauſes, upon all thoſe called to the ſucceſſion, except the heirs male of the grantor's own body: none of the deeds before mentioned, executed by the father or grandfather of Earl John, contained ſuch clauſes prohibitory, irritant, or reſolutive.

Earl John died in May 1690, without being ſerved heir to his father, as he was bound to be by the contract 1684. He was ſucceeded by his eldeſt ſon William, the ſecond of that name, Earl of Dundonald, who was ſerved heir in general and in ſpecial to his father; and upon ſuch ſervice was infeft, but died under age. He was ſucceeded by his brother John, who in 1705 was ſerved heir in general and in ſpecial to his late brother, and infeft.

By marriage ſettlement in March 1706, betwixt this Earl John the ſecond, when under age, with conſent of his curators, and Lady Ann Murray, the earl ſettled the whole lands and eſtate belonging to the family, to himſelf, and the heirs male of his body; whom failing, to his heirs male whomſoever, whom failing, to his heirs and aſſignees whomſoever, reſerving a power to alter, in ſo far as he had power by any tailzies or deeds executed by his predeceſſors.

In October 1711, the earl having only one ſon of the marriage, executed bonds of proviſion to his three daughters in the aggregate ſum of 16,000*l.* ſterling: and upon the 16th of ſame month, he executed other bonds of proviſion to his ſaid daughters for 7000*l.* more, to be a burden on his heirs male not deſcended of his own body, and ſucceeding to him in his lands and eſtate.

On the 29th of December 1716, he executed a bond of proviſion to his ſaid daughters for 8000*l.* only, and revoked all former bonds of proviſion granted to them. And on the 31ſt of ſame month, he executed a bond of tailzie, reciting, that being fully determined, failing heirs of his own body, or heirs male of any of the deſcendants of his own body, to ſettle the ſucceſſion of his eſtate in one perſon; and that the ſame might not be divided by

the ſucceſſion of heirs portioners; he therefore bound and obliged himſelf and his heirs of line, male, conqueſt, and proviſion, and ſucceſſors whatſoever, failing heirs male as ſaid is, to provide and ſecure heritably, and to make reſignation of all and ſundry lands, lordſhips, &c. belonging to him and contained in his rights and infeftments, in the hands of his immediate ſuperiors, to and in favour of Lady Ann Cochran, his eldeſt lawful daughter, and the heirs male of her body, whom failing to his other daughters therein named, and the heirs male of their bodies, whom failing to his other heirs male whatſoever, whom failing to his heirs or aſſignees whatſoever, the eldeſt heir female always ſucceeding without diviſion.

This Earl John died in June 1720, leaving William his only ſon, and three daughters, Ann, Suſanna, and Katherine. In 1722 Earl William was ſerved heir male and of line to his father, and was thereupon infeft. On the 3d of Auguſt 1722, he being ſtill a minor, with conſent of ſix of his curators, executed a procuratory, reciting the ſaid bond and deed of tailzie granted by his father, and that he as heir ſerved and retoured to him, ſtood bound to implement the ſame, therefore he granted procuratory to reſign the ſaid lands in favour of his ſiſter Lady Ann, upon failure of heirs of his own body, and in terms of the bond executed by his father.

In January 1725, 14 days before his death, Earl William revoked the ſaid procuratory by a deed ſigned by him and three of his curators; and he, ſame day, executed, with conſent of theſe three guardians, a new ſettlement of his eſtate in favour of the reſpondent, his ſucceſſor in the title, and the heirs male of his body, whom failing to two of his curators (who authorized him to execute the deed), father and ſon, and with other ſubſtitutions, being in favour of the heirs ſucceeding to him in the title. Earl William died on the 28th of January 1725, under age, and without iſſue.

After his death a competition aroſe relative to the property of his eſtates, between the preſent parties; the Marquis of Clydeſdale, the only ſon and heir of the ſaid Lady Ann Cochran, the ſiſter of William the laſt earl, who was married to James Duke of Hamilton and Brandon in February 1723, claiming under the bond of tailzie, executed by Earl John on the 31ſt December 1716, and procuratory executed by Earl William, contending that the revocation and ſubſequent deed were void; and the preſent Earl of Dundonald, the great grandſon of the firſt Earl of Dundonald, being deſcended from the ſecond ſon of William Lord Cochran, who died in the lifetime of the firſt earl, claiming upon the revocation and deed executed by the laſt earl in 1725, but particularly upon his character of heir male to the ſaid William Lord Cochran, the ſon of the firſt earl, who had died infeft in part of the lands, and whoſe ſucceſſion had not been taken up by any perſon by ſervice as heir to him; and claiming right to all the other lands by virtue of the ſettlements of 1680, 1684, and 1706.

Briefs

Brieves were take out for ſerving the marquis heir to the two laſt earls, but oppoſition being made by the preſent earl, both parties brought their actions of declarator before the Court of Seſſion, for aſcertaining their ſeveral claims to the eſtate. Theſe cauſes being conjoined, and being fully argued before the Court of Seſſion, their lordſhips, on the 16th of December 1725, "Found "that by the bond of tailzie 1716 years, the daughters of the "grantor are called to the ſucceſſion in their order, before any "heir male not deſcended of the grantor's body; and found that "William Earl of Dundonald could not on death-bed, nor in his "minority, though with conſent of his curators, gratuitouſly "make any alteration of the deſtination of ſucceſſion contained "in the ſaid bond; and repelled the allegation that the alteration "was onerous becauſe of the mutual tailzie, and therefore ſuſ- "tained the bond 1716, though not regiſtered in the regiſter of tail- "zies as a title to the Marquis of Clydeſdale to ſerve heir of provi- "ſion; and found that neither the clauſe of return in the contract "1653 and 1656, or diſcharge 1657, nor the ſubſtitutions in the "procuratory of reſignation 1680, or contract of marriage 1684, "did diſable the laſt John Earl of Dundonald gratuitouſly to alter "the ſucceſſion by a deed in favour of his daughters, in preju- "dice of the heirs male of the former inveſtiture:

This firſt part of the interlocutor appealed from by the Earl of Dundonald.

"But further found, that the procuratory of reſignation 1680 "years, and charter and ſaſine following thereupon in favour of "William Lord Cochran, joined with the ſubſequent infeftment "and poſſeſſion of his heirs, did not effectually eſtabliſh in the "perſon of the laſt John Earl of Dundonald the property of the "lands and eſtate, wherein William Lord Cochran, ſon to the "firſt Earl of Dundonald, died laſt veſt and ſeiſed by either "public or baſe infeftments; and repelled the allegation of pre- "ſcription, pleaded for the Marquis of Clydeſdale; and alſo the "allegation of not regiſtration of William Lord Cochran's infeft- "ments 1653, in the regiſter of ſaſines of the ſhire of Renfrew, "and that the infeftments 1653 and 1656 were not clothed with "poſſeſſion; and therefore found, that the lands and eſtate "wherein William Lord Cochran died laſt veſt and ſeiſed are "yet *in hæreditate jacente* of the ſaid William Lord Cochran, and "that the preſent Earl of Dundonald may ſerve heir to him "therein: and found that the Earl of Dundonald, by ſo ſerving "heir to the ſaid William Lord Cochran, paſſing by Earl John, "maker of the gratuitous bond of tailzie 1716, is not by the act "of parliament 1695 obliged to fulfil the ſaid bond of tailzie, "and reduced, decerned, and declared accordingly."

This ſecond part appealed from by the marquis.

Petitions were given in by both parties againſt this interlocutor, but the Court, on the 26th of January 1726, "adhered to their "former interlocutor of the 16th of December laſt; and found "that the lands and eſtate, wherein William Lord Cochran died "veſt and ſeiſed, to which no title was made up by his ſucceſ- "ſors by ſervice or precept of clare conſtat as heirs to him, or by "diſpoſition from him, are yet *in hæreditate jacente* of the ſaid "William Lord Cochran and that the preſent Earl of Dundo-

Appealed from by both parties.

"nald

" nald may ſerve heir to him in ſuch of the ſaid lands and eſtate " as are ſettled upon heirs male, and found that the Earl of Dun- " donald, by ſo ſerving heir to the ſaid William Lord Cochran, and " paſſing by Earl John, maker of the gratuitous bond of tailzie " 1716, is not by the act of parliament 1695 obliged to fulfil the " ſaid bond of tailzie, and remitted to the Lord Cullen, Ordi- " nary, to apply this and the former interlocutor, as to the par- " ticular lands, wherein the ſaid Lord Cochran died veſt and " ſeiſed, and whereto a title was not eſtabliſhed in the perſon of " any of his ſucceſſors."

Appealed from by the marquis.

And on a petition for the Earl of Dundonald, their lordſhips, on the 28th of January 1726, " repelled the allegation pleaded " for the Marquis of Clydeſdale upon the bond of tailzie 1688, " as being liable to the ſame objections as the bond of tailzie " 1716, and altered by the contract of marriage 1706 years; " but ſuperſeded to determine what heir ſhould be liable to the " debts, until the ſervices be expeded, leaving the creditors to " purſue the repreſentatives of their debtors as accords (*a*)."

Entered, 11 Feb. 1725-6.

The original appeal was brought by the Marquis of Clydeſdale from " part of two interlocutors of the Lords of Seſſion of the " 16th of December 1725, and 26th of January thereafter; and " from the whole interlocutor of the 28th of the ſame month."

Entered, 16 Feb. 1725-6.

And the croſs appeal by the Earl of Dundonald from " other " parts of the ſaid two interlocutors of the 16th of December and " 26th of January."

On the Original Appeal—Heads of the Argument of the Appellant the Marquis.

By the ſettlements made upon William Lord Cochran, by his father the firſt Earl of Dundonald, it was optional to him to take infeftments in theſe premiſes, as holding them either immediately of the crown, or of the grantor. William the ſon choſe the laſt, but he was at liberty any time afterwards to take new infeftments, holding the lands immediately from the crown, and ſuch new infeftments would have rendered the former baſe infeftments void and uſeleſs, and eſtabliſhed a complete right in his perſon, and thoſe baſe infeftments could never have been taken up by any of his after heirs. But William the ſon not having taken ſuch infeftments from the crown in his life, John his ſon and heir could not do ſo upon the former procuratories, for thoſe were void by the death of the grantee. He had no way to ſupply this, but either by compelling William the father by an action at law to grant a new procuratory, or by William the father executing one voluntarily. William the father choſe this laſt method, and in 1680 made a ſettlement of the ſame premiſes to John the grandchild, who had the only right by the firſt ſettlement, limited to the ſame heirs, containing a procuratory of reſignation; which laſt procuratory was made uſe of, and a charter granted by the crown thereon, and John the grandſon was thereupon infeft; and upon

(*a*) *Vide* this reſerved point, in Kaims, January 1727, No. 75.

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this title the eſtate has been ever ſince poſſeſſed, and the ſeveral deſcendants ſerved heirs thereupon. It cannot be denied, but that if John the grandſon had commenced an action againſt William the grandfather, and obliged him to grant a procuratory, it would have been good, and the charter from the crown well founded; and it ſeems to be a ſtrange diſtinction to ſay ſuch procuratory would have been good if he had been forced to do it by ſuit, but not good where he ſubmitted to do it without ſuit.

The infeftments of 1653 and 1656, in favour of William the ſon, never having been completed and made public by poſſeſſion, and the infeftment 1653 not recorded in the regiſter of ſaſines for the ſhire of Renfrew, where a conſiderable part of the lands lie, the public infeftment of 1680 in favour of John Lord Cochran is preferable, as being a complete deed attended with poſſeſſion.

The conveyance of 1680 proceeds upon a recital of full powers reſerved to William the father to diſpoſe of the eſtate at pleaſure; and as the powers might have been contained in diſtinct deeds, though they are now not to be found, the law at this diſtance of time preſumes there were ſuch deeds, and ſuch deeds muſt have been ſubſiſting at the time of the marriage ſettlement 1684, for they are then recited; and it cannot ſurely be imagined but that the counſel for the lady would ſee the Deeds there recited; and after ſo long a term as forty years, the law diſpenſes with not producing them; the rather, that theſe powers have been expreſsly acknowledged by John the grandſon, the only perſon who could be by them prejudiced, and his acknowledgment is ſufficient proof againſt all ſucceeding heirs.

This eſtate having now been poſſeſſed by virtue of the infeftments 1680, and ſubſequent infeftments following thereupon, there is a poſitive preſcription eſtabliſhed, which empowered the laſt Earl John, upon the footing of thoſe titles, to diſpoſe of the eſtate at pleaſure; and likewiſe a negative preſcription againſt the pretended ſeparate ſettlement, as is clear by the act of parliament, 1617, c. 12. anent preſcription of heritable rights.

By the act of parliament 1695, c. 24. any apparent heir paſſing by another heir, who had been three years in poſſeſſion, is obliged to fulfil the deeds of the intermediate heir, whom he paſſes by, and therefore the reſpondent cannot make up titles to any lands which belonged to William the ſon, without paſſing by John Earl of Dundonald, grantor of the deed 1716, who was more than three years in poſſeſſion, and therefore he muſt fulfil that deed in favour of the appellant.

Argument of the Reſpondent, the Earl of Dundonald.

Though an heir has it in his choice, whether he will ſerve to his anceſtor or not, and during his life no remoter heir can quarrel his poſſeſſion; yet if he does not ſerve heir, and thereby make up a lawful title to the eſtate that was in his anceſtor, the next ſucceeding heir, after his deceaſe, may, by the law of Scotland, ſerve heir to that anceſtor, and will be thereby entitled to the eſtate, as if the preceding heir had never exiſted. And before the

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act 1695, no debt nor deed, for whatever valuable conſideration, of ſuch perſon who did not ſerve heir, could have been effectual againſt the next ſucceſſor, ſerving heir to the anceſtor infeft; and it is plain John Lord Cochran the grandſon was ſenſible that unleſs he ſerved heir to his father, he had not a lawful title to his eſtate; for by his marriage ſettlement 1684 (to which his grandfather was a party,) he covenanted to obtain himſelf infeft as heir of his father, in the lands wherein his father died inveſted, without any reſerved power to his grandfather.

Though, as the law then ſtood, the procuratories 1653 and 1656 in favour of William Lord Cochran, could not have been uſed after his death, but muſt have been renewed to his heir; yet the perſon to whom they were to be renewed, muſt firſt have been actually ſerved heir, before he could have been entitled either to ſue for, or even receive, a performance of Earl William's obligation to renew the ſaid procuratories; but in this caſe the procuratory 1680, was ſo far from being a renewal of thoſe of 1653 and 1656, that it does not only not mention them, but is in direct oppoſition to them; for by the procuratory 1680, the earl reſerved a power in himſelf "to ſell the eſtate, or charge it with "debts;" whereas by the former procuratories the fee ſimple was abſolutely veſted in his ſon, without any power at all reſerved to himſelf. But if the procuratories, 1653, and 1656, had been renewed to John Lord Cochran, as heir of his father, yet his father's baſe infeftments would not have been thereby extinguiſhed or conſolidated, unleſs he had alſo been ſerved heir ſpecially to thoſe baſe infeftments of his father, and been infeft himſelf thereon, or had taken the other method of being infeft by precept of *clare conſtat*.

William Lord Cochran had poſſeſſion two ways, firſt by the poſſeſſion of his father, whoſe life-rent was reſerved, and in the eye of the law the life-renter's poſſeſſion is the poſſeſſion of the fiar: ſecondly, William Lord Cochran was in actual poſſeſſion, of part of the eſtate which was allotted to him for his maintenance, and which was all he could be in the actual poſſeſſion of during his father's life; and in the next place, baſe infeftments, though neither recorded nor followed with poſſeſſion, are good againſt the grantor, and preferable to any ſubſequent infeftment made without a valuable conſideration, and in this caſe, the infeftment 1680 was voluntary, and from the grantor of the prior baſe infeftments to his heir apparent, who thereby became liable to make good the deeds of the grantor, and conſequently thoſe very deeds of 1653, and 1656.

It may be reaſonably preſumed, that the earl had forgot that he had by the deed 1657 diſcharged all the powers he had reſerved by the deed 1653; but both the earl and his grandſon ſoon afterwards, in effect, acknowledge that recital to have been a miſtake, when by the deed 1684 the grandſon becomes bound to make up his titles to the lands wherein his father had been infeft; and in the clauſe of warrandice in that deed, the earl excepts the rights formerly granted by him to his ſon; both which had been

needleſs, had the earl had the reſerved powers pretended; but the powers recited to have been reſerved to the earl, can only be conſtrued to be the power of ſelling or mortgaging the lands of Kirkmichael and Dalmuir, which the earl had reſerved to himſelf, in the infeftments of thoſe lands to his ſon.

Preſcription can only run, for a title, under which there has been an uninterrupted poſſeſſion of 40 years; or againſt a title, under which there hath been no claim for 40 years; but in this caſe, the perſons who have been in poſſeſſion for 40 years paſt, have had both rights, that is to ſay, the right of poſſeſſion as heir male of William Lord Cochran, (an heir being legally entitled to poſſeſſion, though he be not ſerved heir,) and the right now claimed by the marquis under the infeftment 1680; and therefore, as the poſſeſſion has been all along held by the ſame perſons under both titles, no preſcription can run for one title, againſt another title in the same perſon, at the ſame time. Beſides, one of theſe titles is but lately deſcended to the preſent earl, who could not claim it during the life of any of the former earls, and it is a maxim in law, *contra non valentem agere non currit preſcriptio*; and, if he had been *valens agere*, he was a minor.

The marquis contended, that by the act 1695, c. 24. a perſon who paſſes by his immediate anceſtor, and ſerves heir to a remoter, is liable for the debts and deeds of the anceſtor paſſed by, and therefore if the preſent earl ſerved heir to William Lord Cochran, and paſſed by Earl John the firſt and ſecond, he was obliged to perform their deeds; and, conſequently, to perform the bonds of tailzie 1688, and 1716, which they made. But the title of this ſtatute is "An act for obviating the frauds of apparent heirs:" and the preamble is, "conſidering the frequent "frauds and diſappointments that creditors ſuffer, through the "contrivance of apparent heirs in their prejudice; and for remedy "thereof, ordains," &c. Now though the words of the act are, debts and deeds in general, yet from the title, preamble, and whole tenor of the act, theſe muſt be conſtrued to be, debts and deeds for a valuable conſideration, but not deeds merely gratuitous.

On the Creſt Appeal.—Heads of the Argument of the Earl of Dundonald.

Suppoſing Earl John the ſecond had a power of altering the ſucceſſion of the eſtate, yet he had not done it by the bond 1716, which recites, "that he had determined, failing heirs male of "his own body, or heirs male of any of the deſcendants of his "body, to ſettle the ſucceſſion of the eſtate in one perſon, that "the ſame might not be divided amongſt heirs portioners, and "therefore he obliged himſelf, and his heirs of line, and heirs "male, failing heirs male as ſaid is, to make ſurrender of all his "lands contained in his infeftments thereof, for new infeftments "to be granted to his eldeſt daughter, and the heirs male of her "body," &c. And then he "appoints his three daughters, "ſucceſſively, to be heirs of tailzie and proviſion, to him and to "the

" the heirs male of his body, or heirs male of the defcendants of " his body, in the ſaid lands, with power to them to take out " brieves and obtain themſelves ſerved heirs and infeft therein." Now it is plain, by the words of this bond, that the daughters of Earl John are not called to the ſucceſſion, till failure of heirs male of the deſcendants of his body, which has not yet happened; for the preſent earl is the *heir male* of Earl William, who was deſcendant of the body of the ſaid Earl John; and it is plain, that the intention of the bond is only to prevent the diviſion of the eſtate among co-heireſſes, which would never happen till failure of all the heirs male, to whom it was limited by the former ſettlements. And this is confirmed by the clauſe, which empowers the daughters to obtain themſelves infeft by brieves and ſervice, which method, by the law of Scotland, they could not purſue until failure of all the heirs male, who were preferred to them in the former infeftments. But the reaſon of Earl John's making this bond, was to ſupply a defect in his marriage-ſettlement 1706, which had not provided that, in caſe of the deſcent of the eſtate to heirs female, the eldeſt ſhould ſucceed without diviſion, as had been done in all the former ſettlements.

Argument of the Reſpondent the Marquis.

John Earl of Dundonald, the marquis's grandfather, had an undoubted right to limit the ſucceſſion of the eſtate to his own right heirs; for though by ſeveral of the former ſettlements the limitations were to heirs male, yet theſe containing no prohibitory or irritant clauſes, the ſaid earl, or any other of his predeceſſors, had power to alter thoſe ſettlements; and as this was done by John firſt Earl of Dundonald in anno 1688, ſo it was effectually done by the marquis's grandfather, by the ſaid deed in 1716, whereby the eſtate, upon failure of iſſue male of Earl John's body, was limited to his eldeſt daughter and the heirs male of her body, and the marquis being the heir male of her body is well entitled to the ſaid eſtate, and the ſame ought to be decreed to him.

A ſettlement made by any perſon upon his heir apparent, with ſeveral remainders over to other perſons, and upon failure of them to return to him and his right heirs, is no more than a ſimple deſtination or nomination of ſeveral heirs, and upon failure of them to the grantor's right heirs, and conſequently is no bar to any alienation or alteration by any of the remainder-men. Whatever effect a clauſe of return might have to the perſons in whoſe favour the laſt limitation is made, or ſuch clauſe of return conceived, it can operate nothing in favour of any of the intermediate heirs who are prior to the laſt limitation, the perſons to whom the ſame is to return can only have the benefit of it, that is the marquis, who is the right heir of the ſaid William Earl of Dundonald; and whatever benefit the clauſe of return can occaſion will be in favour of him and him only. And ſince he does not complain of any prejudice, none of the intermediate heirs can take any benefit of that clauſe of return, eſpecially ſince their claim is to defeat the very perſon in whoſe favour the clauſe was inſerted.

inſerted. Thoſe deeds, 1653, 1656, and 1657, in which the clauſes of return are inſerted, are not the ſubſiſting titles of the eſtate, they were varied and altered by the after-deed 1680, whereby the eſtate was ſettled by the firſt Earl William upon John Lord Cochran his grandchild, and the ſeveral perſons therein named, without any clauſe of return.

It is the general rule, by the law of Scotland, that no ſettlement of this kind, where no prohibitory clauſe is added, will prevent any alteration in the order of ſucceſſion, eſpecially when the alteration is in favour of the right heir deſcending of that very marriage; nor is there any particular thing in this caſe that can ſet aſide the general rule, and ſuch ſettlement is only conſidered as done for valuable conſideration, in ſo far as concerns the heirs of the marriage: but is entirely voluntary as to all other heirs; and William the father, by the deed 1684 releaſes all power he had over the eſtate; and John the grandchild reſerves to himſelf an abſolute power of alienation, and charging the premiſes with debts: ſo Earl John, the appellant's grandfather, by his marriage-articles, reſerved a power of alteration, and has accordingly executed that by the deed 1716.

Earl John intending to limit the eſtate to his own daughters, in priority to his collateral heirs male executed the deed in 1716, whereby he obliges himſelf, his heirs male, of taillie, proviſion, &c. upon failure of heirs male of his own body, and the heirs male of the deſcendants of his own body, to ſurrender the eſtates in favour of the marquis's mother, and her ſiſters reſpectively in tail male, that is, in caſe there ſhould be no iſſue male of Earl John's own body, nor heirs male of the body of any iſſue male of his body, in each caſe his daughters were to ſucceed in priority to his collateral heirs male, eſpecially ſince he obliges his heirs male to make this ſurrender, which could not poſſibly have any effect in caſe he had it in view, as the preſent Earl of Dundonald pretends, that his heirs male, though not deſcended of his own body, were to ſucceed before his daughters; then the deed was of no uſe, nor could any heir male be compelled to have completed the title. By the deed 1716, in caſe of failure of iſſue male of the marquis's mother and her ſiſters, the next immediate remainder is to Earl John's heirs male, which ſhews plainly that he intended his daughters ſhould take firſt, and that his heirs male were only to ſucceed upon failure of iſſue male of his daughters; and yet, by the earl's conſtruction, the heirs male are to ſucceed before the daughters, and their right only to commence upon failure of the remoteſt heirs male of Earl John. When the eſtates are limited to the collateral heirs male, Earl John charged his eſtate with the payment of 16,000*l.* as the fortunes of his three daughters, and likewiſe charged it with 7000*l.* more, in caſe the eſtate ſhould deſcend to any heirs male but thoſe of his own body; but having varied the former limitations, and thereby ſettled his eſtate upon failure of iſſue male of his own body upon his daughters, he diminiſhed their fortunes, and charged the eſtate only with 8000*l.* The marquis not only claims

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by virtue of the deed in 1716, but by the ſettlement 1688, whereby the eſtate is limited to the heirs female of Earl John the grandſon upon failure of heirs male of his body; and the laſt Earl William dying without iſſue, the heirs male of Earl John failed, and the eſtate, by virtue of that limitation, deſcended to the marquis; as the eldeſt ſon of the eldeſt heir female of Earl John the grandfather.

There is no law requires any deed of entail, either to be completed by infeftment, or recorded during the grantor's life; and this deed not being in favour of the Earl of Dundonald, he muſt, as the collateral heir male, be bound by the ſeveral covenants therein.

There was no valuable conſideration granted by the Earl of Dundonald for the revocation executed by Earl William on deathbed; the preſent earl did entail his eſtate, failing heirs male of his own body, to the ſaid earl and the heirs male of his body, a few days before he died, when it was obvious he could neither live to enjoy the eſtate, nor have heirs procreate of his body; and the deed 1716 being completed by the death of Earl William the infant, without any need of further delivery, the ſame became irrevocable; and the procuratory of reſignation, granted by the laſt earl in 1722, being granted purſuant to the deed 1716, and completed by delivery, could not be revoked by him. All theſe deeds were not only granted while the ſaid earl was on deathbed, but likewiſe while he was a minor; and no minor, even with conſent of his guardians, can alter the former ſettlements of his eſtate, and more eſpecially in this caſe, when the laſt earl, at the time of granting thoſe deeds, was abſolutely incapable by preſſure of ſickneſs, and the effects of a raging fever; and theſe deeds were only authorized by three guardians, two of whom had a very direct and manifeſt intereſt: for upon the failure of the reſpondent without male iſſue, the eſtate would deſcend to theſe two guardians, the father and ſon, in whoſe houſe the earl was then kept, and by whom thoſe deeds were in a very extraordinary manner procured from him.

Judgment, 22 April 1726.

After hearing counſel, *It is ordered and adjudged, that as well the original appeal of the Marquis of Clydeſdale, as the croſs appeal of the Earl of Dundonald be diſmiſſed; and that the ſeveral interlocutors in the ſaid appeals complained of be affirmed.*

For the Marquis of Clydeſdale, *P. Yorke. Dun. Forbes. Ro. Dundas.*

For the Earl of Dundonald, *C. Talbot. J. Ferguſſon.*

Sir Alexander Cuming of Culter, Baronet, Eldeſt Son, Executor, and Aſſignee of Sir Alexander Cuming, deceaſed - - *Appellant;*
James Ferguſon Eſq., of Pitfour - - *Reſpondent.*

Caſe 139.

23d April 1726.

South Sea Company.—Act 7 Geo. 1. St. 2.—An heritable bond is granted in conſideration of transferring a ſum of South Sea ſtock, *at the then next opening of the books*; by a ſeparate obligation the grantee was entitled to transfer, at ſaid opening or any time thereafter, *on three days advertiſement*; by an act of parliament all contracts for the ſale of ſtock not performed by a certain day were to be regiſtered, or otherwiſe void: The ſtock was not transferred at the opening; the bond was regiſtered in due time, but not the ſeparate obligation. In a reduction it is found relevant to reduce the bond, that the transfer was not made at the opening as ſpecified in the bond, &c. and the defence on the ſeparate agreement is repelled, it not being regiſtered in terms of the act of parliament.

But at the bar the parties made an agreement that the bond ſhould be good for part of the ſum, and on their agreements the interlocutors are reverſed, and the bond ordered to be effectual for that ſum.

ABOUT the latter end of June 1720, an agreement was entered into at London, between the appellant's late father, and the reſpondent, for the ſale of 500*l.* South Sea ſtock. On the 5th of July thereafter the reſpondent granted an heritable bond over his eſtates in Scotland, to the late Sir Alexander Cuming, the perſonal obligation of which was in the following terms:

"Be it known to all men, me Mr. James Ferguſon of Pitfour, "Foraſmuch as Sir Alexander Cuming, Baronet, has of this "date granted an obligation, to transfer to me, my heirs, and "aſſigns the ſum of 500*l.* original ſtock of the South Sea, *at the "next opening of the Company's books*, and that together with the "dividend of the ſaid ſtock, upon my granting of theſe preſents "for the price of the ſame; therefore I bind and oblige me, "my heirs, and ſucceſſors, to content and pay to the ſaid "Sir Alexander Cuming, his heirs, executors, adminiſtrators, or "aſſigns in London, on or before the 1ſt of March next enſuing "5500*l.* ſterling, as the conſideration money, or price of the ſaid "ſtock, at the rate of 1100*l.* for each hundred of ſtock; together "with 1000*l.* of penalty in caſe of failure, and annual-rent of "the ſaid principal ſum during the not payment after the ſaid "term of payment."

Of the ſame date, the reſpondent received from Sir Alexander Cuming a note or obligation in the following terms:

"I Sir Alexander Cuming, Baronet, oblige me, my heirs, "executors, and adminiſtators, to transfer to Mr. James Ferguſon, his heirs, or aſſigns, 500*l.* ſterling of original South Sea "ſtock, and that at the next opening of the Company's books "*or any time thereafter, on three days advertiſement*, having received

" the value of him by bond of this date, and I hereby declare " that he is entitled to the dividend on this ſtock."

The reſpondent ſoon after went to Holland, from whence he wrote ſundry letters to the appellant's father, which were founded on in the action that aroſe between the parties. In a letter dated the 26th of July 1720, the reſpondent writes that he intended to be in London by the opening of the books, and ſays, " if you can ſell me 500*l.* or 1000*l.* on the ſame terms you " did the laſt, I will be your merchant." In another letter dated the 27th of Auguſt, the reſpondent writes, " I took a premium " of 20 per cent. on your ſtock to give the refuſal of it at 1500*l.* " I wiſh it be required." By a letter of the 6th of September, he informed Sir Alexander that he was far from repenting of his bargain, and though he was upbraided by letters from Scotland for the bargain he had made, yet he was ſure he would never complain of Sir Alexander. And on the 24th of September, when ſtocks were ſinking, the reſpondent wrote that he ſtill continued to have ſo good an opinion of them, that he wiſhed that all the money he had, or could command, were drowned in the South Sea at the then current price.

Sir Alexander Cuming did not transfer to the reſpondent the 500*l.* ſtock with the dividend at the opening of the South Sea books, on the 22d of Auguſt 1720. And ſtock having declined rapidly in value, by the time the reſpondent returned to London, he refuſed to accept the transfer, or to pay Sir Alexander the ſum contained in his bond.

Sir Alexander thereupon brought an action of mails and duties before the Court of Seſſion, againſt the tenants of the reſpondents eſtate over which he had granted ſecurity; and alſo an action againſt the reſpondent himſelf, for payment of the ſum contained in the bond with intereſt. The reſpondent brought a counter action for reduction of the ſaid bond; and upon his petition the Court ſtayed proceedings upon the actions at Sir Alexander's inſtance, till the action of reduction was diſpoſed of.

When this action came to be heard, the reſpondent inſiſted, that the ſaid heritable ſecurity having been granted in conſideration of the obligation to transfer to the reſpondent 500*l.* ſtock with the dividend at the opening, but this conſideration not having been performed, the bond was void. He founded alſo upon two clauſes in the act of 7 Geo. 1. ſtat. 2. which enact, that every contract for the ſale or purchaſe of South Sea ſtock, unperformed, or not compounded by the parties, on or before the 29th of September 1721, and a memorial of which was not regiſtered, as therein mentioned, before the 1ſt of November 1721, ſhould be void; and that ſuch contract ſhould alſo be void, if the ſeller were not at the time of ſuch contract, or within ſix days after, actually poſſeſſed of or entitled in his own right, to the ſtock ſo ſold by him. Upon theſe clauſes, the reſpondent contended, that the contract in queſtion being unperformed and not compounded, the appellant ſhould ſhew that it was regiſtered, and that he was poſſeſſed of ſtock in terms of the act.

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The appellant ſtated in anſwer to this, that the conſideration of nting the bond, was the obligation from the appellant to transſtock at the opening, *or* at any time after, on three days advertment; and that this alteration did not allow him to transfer he opening of the books when the reſpondent was in Holland; t the tranſaction could not be ſaid to be unperformed, but was npleted by granting the bond and obligation; and, therefore, t it was not neceſſary that the contract ſhould have been ered, or that the appellant ſhould ſhew he was poſſeſſed of k in terms thereof. He ſtated, however, that he had regiſd the bond granted by the reſpondent within the time limited the act; but that the obligation granted by himſelf was not iſtered, having been out of his cuſtody. The Lord Ordinary the 17th of November 1722, ordered the appellants' father to in a particular condeſcendance, in terms of the act of parliant of the ſtock he was poſſeſſed of, or entitled to at the time of contract between the parties; and the Court on the 7th day November thereafter adhered to the Lord Ordinary's interlocu-

The late Sir Alexander, accordingly gave in a condeſcenice, which ſatisfied the Court upon that point.

After various further proceedings, the Court on the 15th of cember 1724, "found the reaſons of reduction relevant and proved, that Sir Alexander Cuming did not perform in terms of the ſaid bond; and repelled the defence made upon the alernative clauſe or condition of the obligation, granted by Sir Alexander Cuming, in regard the ſaid obligation, (though a part of the contract) was not regiſtered nor any abſtract or memorial thereof entered in terms of the act of parliament 7*mo. Georgij Regis.*" Sir Alexander having reclaimed, after wers for the reſpondent, the Court on the 9th of January 1725, found the reaſon of reduction relevant and proved, that Sir Alexander Cuming did not perform in terms of the obligement as recited in the bond, by transferring or tendering a transfer at the opening of the books; and found that the writs conſtituting this bargain of ſale, or an abſtract or memorial thereof, ought to have been regiſtered, conform to the act of parliament 7*mo Georgii*, and found that the regiſtration of the bond, (which did not contain the alternative clauſe mentioned in the ſeparate obligation,) was not a ſufficient regiſtration of the contract, and therefore repelled the defence founded on the ſaid alternative clauſe, and adhered to their former interlocutor, and refuſed the deſire of the petition."

The late Sir Alexander Cuming died on the 5th of February 25, having previouſly aſſigned to the appellant the ſaid heritable id, and all intereſt due thereon.

The appeal was brought from "an interlocutor of the Lords of Seſſion of the 15th of December 1724, and the affirmance thereof the 9th of January following." Entered, 3 Feb. 1725-6.

Heads of the Appellant's Argument.

Sir Alexander, from the obligation given by him, could ſold out the ſtock in order to inſiſt on the difference, b ſtock had riſen, the reſpondent would not have been b ſuch transfer, but he might have called for that 500*l.* ſtc transferred to him, at any time afterwards, upon thr notice: beſides the reſpondent knew very well, that the ſ not transferred at the opening of the books, and he w from complaining of that neglect, that he wrote after t to the appellant's father, that he was deſirous to be a pur more South Sea ſtock.

The act 7th George has no reference to the preſent q the contract for the ſale of ſtock was performed, the ap father having given the reſpondent a note for transfer ſtock, and the reſpondent having given an heritable b ſo much money, which was taken as payment for the ſtoc

But, for greater caution, the appellant's father did ſign and regiſter an exact copy of the ſaid bond, agreeabl directions of the ſaid act. There was no occaſion appellant's father to regiſter the note given by him to the dent; it was in the hands of the reſpondent, who migh regiſtered it, if he thought fit; beſides, the bond whic giſtered, recites the note, and ought to be conſidered a valent to the regiſtering of the note itſelf.

If the alternative in the note varied the original bargai was in favour of the reſpondent, giving him a larger intere putting him under no neceſſity to attend the transfer opening, and obliging the appellant's father to be anſwera the ſtock whenever he ſhould think fit to call for it: the regi of the note therefore, if it had been neceſſary, lay upon the dent, but the appellant does not lay hold of this note to any obligation upon the reſpondent; he only uſes it to matter of fact neceſſary to be cleared. No one can dou the reſpondent's conſent to the not transferring or tender ſtock at the opening, proved by letters or otherwiſe, wou proper anſwer to any objection, that the ſtock was not tr red or tendered; and yet it will hardly be ſuppoſed tha letters, or a memorial of ſuch evidence ought to have bee tered.

Heads of the Reſpondent's Argument.

No evidence can be given of any contract or agreem regiſtered. It appears upon the face of the bond grante reſpondent, which was regiſtered by Sir Alexander Cumi Sir Alexander was to transfer to the reſpondent 500*l.* ſtoc then next opening of the books; *in conſideration whereof*, ſpondent granted his bond for the price payable on the March following. This was clearly a contract for the ſtock unperformed, in the proper ſenſe of the act.

Alexander neither transferred the ſtock, in terms of the contract recited in the bond, which he might have done, though the reſpondent was not preſent; nor did he regiſter any other agreement.

Though the reſpondent had in his cuſtody, the obligation granted by Sir Alexander, yet he muſt be ſuppoſed to have known what was the tenor of that obligation, and might have regiſtered a memorial of it if he had thought fit; as he neglected this the reſpondent can have no advantage from this obligation.

Counſel being called in to be heard upon this appeal, "Mr. Attorney General, on the part of the appellant, having firſt ſtated the nature of the caſe, did then acquaint the houſe, that the ſaid parties were come to an agreement, and that the ſame was put in writing, which if their lordſhips pleaſed they deſired might be confirmed; and Mr. Solicitor General likewiſe acquainting the houſe, that the reſpondent did conſent to the ſaid written agreement. Journal 23 April 1726.

"And the ſame was therepon ſigned by both parties at the bar; and it being then read and delivered in, the counſel were directed to withdraw; and being withdrawn, and conſideration had in relation to this matter,"

It is ordered and adjudged, *according to the ſaid written agreement, that the interlocutors complained of be reverſed, and that the bond and inſeftment in queſtion be reſtricted to* 1000l. *ſterling to be paid at Chriſtmas next with intereſt from this day; and that upon ſuch payment and delivering up the note or obligation for transferring the* 500l. *South Sea ſtock, with the Midſummer dividend, the appellant do deliver up to the reſpondent, the ſaid bond and ſaſine, and grant or procure to be granted a valid renunciation and diſcharge thereof with all that followed thereupon; but in default of payment of the ſaid* 1000l. *and intereſt as aforeſaid, the appellant be at liberty to take out execution upon the ſaid bond for the ſaid reſtricted ſum of* 1000l. *and no more, except ſuch coſts and charges as may be occaſioned thereby.* Judgment.

For Appellant, *P. Yorke. Dun. Forbes.*
For Reſpondent, *C. Talbot.*

Caſe 131. Sir Alexander Cuming, Baronet, eldeſt Son and Executor of Sir Alexander Cuming, Baronet, deceaſed - - *Appellant;*

Robert Pantoun, late of Rotterdam, but now of London, Merchant - *Reſpondent.*

28th *April* 1726.

Lis Alibi pendens.—A defence of *lis alibi pendens* is repelled, where the party produced an order of the Court of Chancery, diſmiſſing a ſuit which he had inſtituted upon ſame grounds with his action in the Court of Seſſion, and declaration under his hand diſclaiming all further proceedings in that ſuit.

Proceſs.—In a proceſs relative to the advance of a ſum of money, the party ſet forth the tenor of an obligation granted by himſelf to the defender's father for a *depoſitum* made by the latter, and certain letters as in the defenders hands: in terms of the act of ſederunt, the defender is held as confeſſed on the tenor libelled, as he neither confeſſed nor denied the ſame, *and ſo given againſt him thereon.*

Uſury.—In a loan of money to be repaid by drawing and re-drawing on a foreign merchant, the borrower agreed to pay the exchange and re-exchange: though this by the courſe of exchange amounted to more than legal intereſt, it was not uſury.

Annual-rent.—A loan agreed to be repaid by a certain day, bore intereſt after that day, though no intereſt was ſtipulated for: exchange and re-exchange which the borrower agreed to pay, alſo bore intereſt from the day of payment. In a decree for payment of a certain ſum, part of this is diſtinguiſhed as principal bearing intereſt, and part as intereſt only.

Depoſitum.—The depoſitary of a South Sea ſubſcription, was warranted in paying money, and accepting ſtock, as the principal muſt have done in terms of an act of parliament.

Coſts.—An affirmance with 50*l.* coſts. Proceedings relative to theſe coſts and mode of recovering the ſame pointed out by the houſe.

THE reſpondent in the year 1723, brought an action before the Court of Seſſion againſt the appellant's late father, therein ſetting forth; that the reſpondent having from time to time ſupplied Sir Alexander Cuming with money, while he was conſervator at Campvere, in June 1720, there was due to the reſpondent 1075*l.* ſterling on a balance of accounts; that the reſpondent being then in London, was, on the 15th of June 1720, applied to for a loan of 2000*l.* more; but not having money ſufficient in his own hands, he prevailed with a Mr. Henry Cairns, Merchant, in London, to advance Sir Alexander 3000*l.* of which he applied 2000*l.* to his own uſe, and paid 1000*l.* to the reſpondent towards the diſcharge of the ſaid balance of 1075*l.*; and Sir Alexander having alſo granted to the reſpondent three notes of 25*l.* each for the remaining 75*l.*, the reſpondent releaſed him of the balance of the old account:

That it was then agreed that Cairns ſhould, to reimburſe himſelf, draw bills upon the reſpondent, for the 3000*l.* payable in Amſterdam, at two months uſance, and the reſpondent was to redraw upon Cairns alſo at two month's uſance; and the reſpondent's bill thereby falling due on the 5th of October, Sir Alexander was

pay the money to Cairns on or before the 4th of October; and Sir Alexander depoſited in the reſpondent's hands in further ſecurity 1000*l.* South Sea firſt ſubſcription, (*a*) whereon 900*l.* had been paid to the company for the firſt and ſecond payments: and that the reſpondent thereupon granted to Sir Alexander a note or obligation, under his hand, to which the appellant was a ſubſcribing witneſs, in the following terms: "I Robert Pantoun, "Merchant in Rotterdam, acknowledge me to have received "from Sir Alexander Cuming, Baronet, a receipt for the firſt and "ſecond payment of 1000*l.* ſterling, firſt ſubſcription in the South "Sea Company, marked No. 1302, which I oblige me to return "to the ſaid Sir Alexander, upon his payment to me of the ſum "of 3000*l.* advanced by me to him as the value of bills, drawn by "Mr. Henry Cairns upon me, payable at Amſterdam, viz. 2000*l.* "by bills drawn the 17th of June inſtant, and for 1000*l.* drawn "this day, as alſo upon payment of the equal half of the loſs of "exchange, &c. in drawing and re-drawing, it being agreed that "the profit and loſs of the draught and re-draught ſhall be equal "between Sir Alexander and myſelf; and it is further agreed, that "the ſaid Sir Alexander Cuming ſhall repay the ſaid ſum of 3000*l.* "betwixt this and the 4th of October next to the aboveſaid Mr. "Henry Cairns: as witneſs my hand in London, 21ſt June 1720. "Robert Pantoun." Witneſs Alexander Cuming:"

That the reſpondent ſame day, put the ſaid ſubſcription into the hands of Mr. Cairns with a note in the following terms: "Mr. "Henry Cairns, the above is a copy of my obligation to Sir "Alexander Cuming, which you are to receive back diſcharged, "when he repays to you the 3000*l.* with the re-exchange and "commiſſion, &c. wherein I entreat you will be very exact. "The firſt ſubſcription of 1000*l.* left in your hands is marked "No. 1302, to be given to Sir Alexander Cuming upon his pay- "ing the money as above:"

That Sir Alexander Cuming having offered to employ ſome part of the money lent him, in the purchaſe of South Sea third ſubſcription, and of Eaſt India ſtock, for the joint behalf of himſelf and the reſpondent, it was therefore agreed, that if any loſs ſhould happen by drawing and re-drawing it was to be equally borne between them; but no ſtock having been purchaſed, the reſpondent wrote to Sir Alexander, from Rotterdam, on the 19th of July 1720, in the following terms, "I wrote you on the 9th "current upon my arrival here; ſince, I have not any from you, "whereat I admire, and my nephew arriving here, tells me that "you have bought no Eaſt India ſtock for our joint account, "howbeit I expected otherwiſe; I ſend you therefore by my "nephew a new obligation from me obliging me to make good "to you the whole profit that may happen upon the re-draught "of the 3000*l.* on Mr. Cairns, and you to pay whatever loſs and "the other charges that may come thereon; ſeeing as you have "given me no intereſt with you, ſo I pretend none of the profit,

(*a*) This firſt ſubſcription was taken by the South Sea Company at 300*l.* per cent.

"and you know I ought to pay none of the loſs, and upon ex-
"changing I have ordered him to ſend me the obligation he is to
"receive from you. Pray give my nephew 75*l.* for the three
"notes you gave me, ſeeing he at preſent wants ready money;
"yea, I promiſe myſelf, that you will be aſſiſtant to him:" And the reſpondent received a letter from Sir Alexander, bearing date the ſaid 19th of July, in the following terms: "I was favoured
"with your's the other day; for my part for all I borrowed, I
"was not able to purchaſe any Eaſt India ſtock, nor hardly to
"make up my ſubſcription money, which I am even docked of,
"and cut off from ſome that I had aſſurance of from directors;
"all that I could procure for you was 20 ſhares of the *poppy oil*
"*patent*:"

That the reſpondent wrote again to Sir Alexander on the 30th of July, in ſimilar terms with his former letter, and requeſting that the 20 ſhares in the poppy oil patent ſhould be delivered to the reſpondent's nephew; and he received an anſwer from Sir Alexander, dated the 15th of Auguſt in the following terms, "I
"complied with every thing you deſired in relation to your
"nephew and have delivered him the 20 ſhares of the oil patent of
"my own ſtock, and I hope they will turn to good advantage; it
"is very well we did not deal in India ſtock, as it has happened,
"and indeed all ſtocks ſeem to decline, but I believe it will not be
"long ſo; as for your obligation which is done on ſtamped paper
"according to form, there will be no need of renewing it: I
"know you will take care that there be as little loſs in re-drawing
"as poſſible, and to adviſe me which will be the beſt way to ſave
"myſelf, for I do not propoſe that you ſhould pay any part of it,
"ſeeing you did not uſe any of the money for paying Sir John
"Lambert for our joint uſes as was at firſt propoſed: ſuch a
"trifle of re-drawing will never break ſquares betwixt you and
"me, nor will I deſire you to pay any part of it:"

That the reſpondent paid Mr. Cairns's bills when they fall due, but by reaſon of the fall of exchange when the reſpondent came to re-draw upon Mr. Cairns, there was loſt by the exchange 287*l.* 7*s.* 5*d.*: on the 16th of Auguſt, the date of Sir Alexander's laſt letter, the reſpondent drew bills at Rotterdam, upon Mr. Cairns, at two uſances, for 3200*l.* and for the remaining 87*l.* 7*s.* 5*d.* he drew on the 17th of September following:

That the reſpondent received a letter from Mr. Cairns, bearing date the 30th of Auguſt 1720, in the following terms, "I com-
"municated to Sir Alexander your draughts of 3200*l.* upon me
"for his account which he aſſured me poſitively that he will pay
"punctually to me againſt the 4th of October next, conform to
"his obligation. Pleaſe to take notice that I have now paid the
"South Sea Company 300*l.* for the third payment of Sir Alex-
"ander Cuming's firſt ſubſcription left in my hands; for as he
"told your nephew and myſelf, he could not do it at preſent
"being ſhort of money. I propoſed to have drawn on you this
"day for the ſaid 300*l.* but that the exchange got up to your
"place; however I will do it ſoon:" And the reſpondent on the

17th

17th of September wrote to Sir Alexander as follows: "I had "your's very acceptable of the 16th paſt. I find by the fall of "the ſtocks, and particularly that of the Eaſt India Company, "that you conclude it beſt, that we had no concern, half in com- "pany therein, and that thereby none of your money was em- "ployed on that account, and ſo I am nowiſe liable to any ſhare of "the damages upon the bills re-drawn upon Mr. Cairns. Here- "with I ſend you an exact account of the 3000*l.* that Mr. Henry "Cairns drew upon me, for your account and accommodation, "amounting to 33,649 guilders, 4 ſtivers, as alſo an account of "the bills I have drawn on him for re-imburſement of the ſame, "being 3287*l.* 7*s.* 5*d.* or 33,649 guilders, 4 ſtivers, which I "aſſure myſelf you will punctually pay; for you will find that I "have not charged one penny for my pains in this matter, yea "not ſo much as for poſt of letters I paid; wherefore pray fail "not, upon receipt hereof, to pay the above 3287*l.* 7*s.* 5*d.* time- "ouſly to Mr. Henry Cairns for diſcharging my aforeſaid bills, "as alſo the 300*l.* that he paid to the South Sea Company for "your account; for all this muſt be certainly done, either by "ſelling the 1000*l.* firſt ſubſcription that lies in his hands, or by "impignorating the ſame in another's hands, and ſo pay the "money early to him for punctually diſcharging all the above "bills. I am ſorry your loſs in the re-draught runs ſo high, yet "I can aſſure you that all was done in the eaſieſt manner poſſible; "yea by this you will ſee what unavoidable loſs I had, when I "was neceſſitated to draw and redraw for the money I lent you; "and to conclude this matter, pray let nothing hinder your punc- "tually paying all the above, by which you know I have not one "penny profit, and did it alone for your accommodation, and at "your entreaty."

That Sir Alexander never anſwered this letter, and notwith- ſtanding repeated promiſes to Mr. Cairns and to the reſpondent's nephew, he did not pay the money to Cairns on the 4th of October, to his utter ruin; for the bills were returned upon the reſpondent under proteſt, who paid the ſame with re-exchange in Holland amounting to 3645*l.* 1*s.* which added to the 300*l.* for the third payment on the ſaid 1000*l.* South Sea ſubſcription, and another 300*l.* for the fourth payment on the ſame alſo diſburſed by the reſpondent, made the aggregate ſum due by Sir Alexander amount to 4065*l.* 1*s.*:

That the reſpondent, having come to England, in July 1721, filed his bill in Chancery againſt Sir Alexander, who ſtood in contempt to a ſequeſtration, and would not put in his anſwer, but went and reſided in Scotland; whereby the reſpondent was obliged to commence the preſent action againſt him, to compel payment of the ſaid 4065*l.* 1*s.* and intereſt ſince the firſt of November 1720, and he founded upon his note granted to Sir Alexander on the 21ſt of June 1720, and his letter to Sir Alexander of the 19th of July thereafter, as in the hands of the defender.

To this libel Sir Alexander Cuming put in the following defences, "1ſt, That there is a *lis alibi pendens*, by a ſuit in Chancery "depending,

" depending, at the purſuer's inſtance, againſt the defender, upon " the very ſame grounds libelled. 2d, That the libel, in " manner and form as it is ſet forth by the purſuer, is neither " relevant; nor, 3d, is it true."

Act of ſederunt, 16th Feb. 1723.

At a hearing before the Lord Ordinary, it was contended for the reſpondent, that in terms of the act of ſederunt 16th February 1723, Sir Alexander ſhould produce the obligation and letter from the reſpondent libelled on, or confeſs or deny the tenor thereof; and if he refuſed to do ſo, that he ſhould be held as confeſſed as to the tenor. His lordſhip, on the 25th day of June 1724, pronounced this interlocutor: " In regard that the " libel recites the obligement and miſſive letter written by the " purſuer to the defender, as of a ſpecial tenor particularly li- " belled, and that it bears theſe writs to be in the defender's own " hands, and that the defender in his defences returned with the " proceſs has neither particularly acknowledged nor denied the " ſaid writs to be of the tenor libelled, nor his having them in " his hands as the act of ſederunt directs; therefore held the " defender confeſſed upon the tenor as libelled, and that the ſaid " writs are ſtill extant in his own hands; and ordained parties pro- " curators to debate in the cauſe, according as if the ſaid writs of " the tenor libelled were produced."

The next day, 26th, a minute was made in the cauſe, ſtating that the defender's counſel had conſented and undertaken that if the Lord Ordinary would allow them a few days to ſend to their client, they would either produce the ſaid writings or admit them to be of the tenor libelled; the Lord Ordinary, of ſame date, " allowed the defender's procurators to produce the writs above- " mentioned, betwixt and the 2d day of July next with certifica- " tion." At next calling, however, the defender's counſel craved further time, ſtating that they were yet without inſtructions; but the Lord Ordinary, on the 4th of July, " ad- " mitted the declaration and miſſive by the purſuer to the " defender to be of the tenor libelled; and found the libel re- " levant and proven, and decerned in the terms thereof ac- " cordingly."

Sir Alexander's counſel gave in a repreſentation againſt this interlocutor, ſtating, amongſt other things, that the defence of *lis alibi pendens* had been overlooked; and the Lord Ordinary, on the 14th of July, " refuſed the deſire of the ſaid repreſentation, " except as to the defence of *lis alibi pendens*, as to which, or- " dained the other party to ſee and anſwer the ſame." In anſwer, the reſpondent produced an order of the Court of Chancery dimiſſing his bill; and by a declaration under his hand, he diſclaimed all further proceeding in that ſuit. The Lord Ordinary thereupon, on the 16th of July, " repelled the defence of " *lis alibi pendens*."

The appellant's father thereupon preſented a reclaiming petition to the Court, ſtating, amongſt other things, that the minutes of debate were unduly drawn up, which bore that the defender's counſel had undertaken, in caſe the Lord Ordinary would give them a few

days

lays to ſend to their client, they would either produce the writings or admit them to be of the tenor libelled; whereas in fact they neither had made, nor had authority to make ſuch undertaking. After anſwers for the reſpondent, the Court, on the 25th of July 1724, "Found that Sir Alexander was obliged to "produce the above declaration, or to have ſet forth the tenor "thereof in his anſwer, and adhered to the Lord Ordinary's in- "terlocutor, holding him as confeſſed upon the tenor thereof as "libelled; and in regard he had ſo delayed to produce the ſame, "found him liable to pay to the purſuer, before he could be "heard upon the principal, when produced, 50*l.* ſterling, in "name of damages and expences."

Sir Alexander next contended, that even according to the reſpondent's own ſhewing, he ought only to have been charged with intereſt on 3000*l.*, and that the drawing and redrawing was a fiction to evade the law of uſury. After anſwers, and a debate upon this point, the Court, on the 3d of December 1724, "Found "that the declaration and obligement libelled upon by Mr. Pan- "toun, the purſuer, and accepted of by Sir Alexander Cuming, "the defender, did import a perſonal obligation on Sir Alexander "to pay the ſums therein contained; as alſo repelled the de- "fences founded upon the uſury."

Upon the reſpondent's application to the Lord Ordinary to apply this interlocutor, Sir Alexander inſiſted upon this new defence, that the reſpondent, before obtaining any decree, ought to reſtore the *depoſitum* in the ſame ſtate and condition he got it. The reſpondent anſwered, that in purſuance of a ſubſequent act of parliament he had lodged the ſubſcription receipt with the South Sea Company, of which he produced certificate, and had alſo paid 600*l.* to the company for the 3d and 4th payments; for which he alſo craved a decree. The Court, on the 9th of December 1724, "Repelled the new defence in reſpect of the an- "ſwer, and ordained the purſuer to give in an account of his "additional demands for advances made by him upon the ſaid "ſubſcription, and the defender to give in written objections "thereto."

Sir Alexander again petitioned the Court, ſtating, amongſt other things, that the reſpondent was indebted to him for conſervator fees, received by the reſpondent, and prayed that the reſpondent might upon oath confeſs or deny the facts therein ſtated. The reſpondent in anſwer ſet forth, that the alleged facts were all prior in date to the tranſactions now in queſtion, and he produced a diſcharge executed by Sir Alexander, witneſſed by the appellant, bearing date the 20th of June 1720, whereby Sir Alexander diſcharged the reſpondent of "all bonds, debts, ac- "counts, and ſums of money, due by him," preceding that date. The Court, on the 31ſt of December 1724, "Found that what "was demanded in the above petition was unneceſſary." And by another interlocutor, on the 1ſt of January 1725, they "ad- "hered to their former interlocutor in preſence, of the date the "3d day of December laſt, and alſo to the Lord Ordinary's inter-

"locutor

" locutor concerning redelivery of the foreſaid ſubſcription, and " refuſed the deſire of the bills."

The reſpondent having given in an account of his additional demand, and craved the Lord Ordinary to decern for the ſame, Sir Alexander contended, that there could be no decree, 1ſt, becauſe the reſpondent had intrometted with Sir Alexander's fees as conſervator: 2d, That there could be no intereſt due upon the 3000*l.*, becauſe none was agreed for: and, 3d, Becauſe there was no deduction for the dividends received upon the ſubſcription. The reſpondent anſwered, that the 1ſt was *res judicata*; 2d, that intereſt was due as much as the principal, the money being paid through Sir Alexander's fault; and, 3d, that he would reform the account and give credit for the dividends. The Lord Ordinary, on the 9th of January 1725, " repelled the two firſt allega- " tions in reſpect of the anſwers; and, as to the third, ordained " the purſuer to reform the account, and to give credit to the " defender for the reſpective dividends recovered from, or allowed " by the South-Sea company, on the foreſaid ſubſcription, and the " defender's counſel to ſee the ſaid account when reformed, and " be ready to object thereto."

The reſpondent thereupon reformed his account, and after giving Sir Alexander credit for the dividends, and for the additional ſtocks and annuities granted to the holders of South Sea ſtock by act of parliament, to Chriſtmas 1724, (though ſome were not received), he ſtated a balance due to him of 4712*l.* 10*s.* 5*d.* for principal and intereſt. Sir Alexander objected, firſt, that the reſpondent ought not to be allowed the fourth payment of 300*l.* upon the ſubſcription, becauſe that payment was not neceſſary; and, 2dly, that the reſpondent had reckoned intereſt not only for the principal ſums, but for the exchange and re-exchange, and for the ſaid 300*l.*, which he ought not to have done. This matter being debated before the Lord Ordinary, his lordſhip, on the 19th of January 1725, " Repelled the objection made againſt " the article of the fourth payment, made by the purſuer to the " South Sea Company, upon the ſubſcription depoſited in his " hands, and ſuſtained the ſaid article, and adhered to his former " interlocutor as to the annual rents; and found annual rents " due for the exchange and re-exchange, as well as for the prin- " cipal ſums, and alſo for the two moieties paid by the purſuer " to the South Sea Company upon the ſaid ſubſcription; and " having conſidered the reformed account given in for the pur- " ſuer, approved of the ſame, and found that after allowance " therein given to the defender of all the dividends iſſued by the " company upon the ſaid ſubſcription, and received by the pur- " ſuer, and alſo of the laſt Chriſtmas dividend, though not re- " ceived by him, there remained due to the purſuer, of principal " and intereſt, upon the 1ſt of January current, the ſum of " 4712*l.* 10*s.* 5*d.* ſterling money, whereof 4065*l.* 1*s.* being the " amount of the ſums paid out by the purſuer is a principal ſum " bearing intereſt; and, therefore, decerned for the ſaid ſum of " 4712*l.* 10*s.* 5*d.* ſterling, and for the annual rent of the ſaid

" principal

" principal ſum of 4065. 1ſ. from and ſince the 1ſt of January " current, and in time coming during the not-payment, and or- " dained the purſuer upon payment, to transfer, in favour of " the defender, the ſtock and annuities, which came in place of " the ſubſcription, with all the dividends, which ſhould ariſe " thereupon from Chriſtmas laſt."

The appellant's father reclaimed, again complaining of the minutes, as to his counſel's conceſſion to produce the reſpondent's note or letter, or to admit the tenor as libelled, and inſiſting upon ſeveral other points before determined. After anſwers, and a hearing upon this petition, the Court, on the 5th of February 1725, " Found that none of the interlocutors pronounced were " founded upon the controverted conceſſion by Sir Alexander's " counſel, and alleged to be wrongfully placed in the minutes, " and therefore refuſed the deſire of the bill, craving the minutes " to be rectified, and likewiſe as to the other points thereof."

The appeal was brought by the appellant, as eldeſt ſon and executor of his late father, from " ſeveral interlocutors of the " Lords of Seſſion of the 25th and 26th of June, the 4th and " 25th of July, and the 3d and 9th of December 1724, the 1ſt, " 9th, and 19th of January, and 5th of February following." Entered, 3 Feb. 1725-6.

(The abſtract of the argument uſed by the parties is contained in the preceding ſtatement of the proceedings in the cauſe.)

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the ſeveral interlocutors therein complained of be affirmed: and it is further ordered that the appellant do pay or cauſe to be paid to the reſpondent the ſum of* 50*l. for his coſts in reſpect of the ſaid appeal.* Judgment, 28 April 1726.

For Appellant, *John Willes. Wi. Wynne.*
For Reſpondent, *Ro. Dundas. C. Talbot.*

On the 16th of May 1726 a petition of the reſpondent was preſented to the Houſe of Lords, ſtating that the appellant had been ſerved with a copy of the judgment, but refuſed to pay the 50*l.*, and therefore praying for " ſuch relief as to their lordſhips ſhould ſeem meet." And thereupon George Pantoun was called in and examined upon oath, touching the allegations of the ſaid petition, and having acknowledged that he had no letter of attorney, or other power from the petitioner for demanding the money; and being withdrawn: " It is ordered that the ſaid petition be re- " jected." Journal, 16 May 1726.

On the 23d of the ſame month of May another petition was preſented to the Houſe of Lords, ſtating that he had empowered George Pantoun of London, Gentleman, by letter of attorney, to demand and receive payment of the 50*l.* coſts, but that Sir Alexander refuſed to pay the ſame; and praying that the Houſe would grant the petitioner ſuch relief as to their lordſhips ſhould ſeem meet: and thereupon the ſaid George Pantoun being called in, and examined upon oath touching the allegations of the ſaid petition; " It is ordered, that the ſaid Sir Alexander Cuming 23d May.

" ſhall

" ſhall pay or cauſe to be paid to the reſpondent the ſaid ſum of " 50*l.* coſts within ten days; and if he ſhall fail therein, that " then his recognizance to his majeſty in the ſum of 100*l.* for " payment of ſuch coſts as the Houſe ſhould appoint, in caſe the " ſeveral interlocutors from which he appealed ſhould be af- " firmed, ſhall be eſtreated into his majeſty's Court of Exche- " quer, in order to have the ſame ſpeedily put in proceſs " there."

Caſe 132. Edgar, 1 Jan. 1725. Mr. Walter Stirling, Writer in Edinburgh *Appellant*; William Gray, of Invereighty - - *Reſpondent.*

Ex parte (*a*).

13th Feb. 1726-7.

Penal Irritancy.—Homologation.—A collector of taxes, during Cromwell's uſurpation, enters into an agreement with a perſon who had a commiſſion to ſue, compound, tranſact, and agree on the part of the Crown: to this commiſſioner the collector granted bonds for certain ſums, and the commiſſioner obliged himſelf to deliver to the collector, *by a day certain*, a ſignal from the Crown, otherwiſe the parties to remain as they were before the bonds were granted: it is found that this is no penal irritancy, and not to be purſued after elapſing of that day.

A payment by the collector, after the elapſing of that day, was no homologation, or paſſing from the reſolutive clauſe.

Preſcription.—Though 40 years elapſed after this alleged homologation, and no declarator brought on this reſolutive clauſe, it was ſtill competent to plead it.

Appeal.—5*l.* coſts given againſt the appellant, who deſerted his appeal.

UNDER the Commonwealth, and during Cromwell's uſurpation, William Gray of Hayſtoun, the reſpondent's anceſtor, was employed as collector of the taxations and other public impoſitions in the ſhire of Forfar. After the Reſtoration, in 1662, an act of indemnity and oblivion was paſſed in Scotland, but with a great many exceptions; one of which related to the accounts of perſons who had intromitted with or received any part of the public money from the year 1639 to the year 1660.

In 1670, the then Earl of Dumfermling obtained a grant or commiſſion from the Crown, under the privy ſeal, empowering him to call to an account, in proper proceſſes before all or any of his majeſty's courts, all intrometters with public money during the years abovementioned, and to recover all public monies in their hands unaccounted for. The commiſſion contained a power to the earl of granting diſcharges or acquittances upon payment, and of tranſacting and compounding; and a clauſe, obliging the earl and his heirs to account to the Crown for his receipts.

(*a*) This ſtatement is taken from the reſpondent's caſe only, the appellant not having appeared at the hearing, and, I preſume, having preſented no caſe.

The

The mode of proceeding with ſome of theſe debtors was to give them a charge of horning, and afterwards by compounding privately with them for ſuch ſums as they could afford; the earl, at ſame time, promiſing to procure them pardons and acquittances from his credit at court. Amongſt others, the ſaid William Gray of Hayſtoun was ſerved with a charge of horning for a very large ſum in 1670; but on the 10th of September that year, an agreement was entered into between the earl and him, in purſuance of which Mr. Gray paid to the earl 2000 merks in caſh, and delivered up to his lordſhip a ſecurity from the Earl of Crawfurd for 14,000 merks; and he as principal, and his ſon William Gray of Invereighty as cautioner, alſo executed and delivered to the earl four bonds, blank in the creditor's name, two for 3000 merks, and other two for 4000 merks each; being in all 30,000 merks.

The earl, of ſame date, executed a releaſe of Hayſtoun's intromiſſions, under the powers his lordſhip then had; and the earl alſo then executed a back bond obliging himſelf to procure under his majeſty's hand a ratification of the ſaid diſcharge, with a remiſſion or pardon, *and to deliver the ſame* ratification and pardon to Hayſtoun between and the 10th day of November following, to the effect he might expede the ſame: *or otherwiſe if the earl failed in procuring thereof, he bound and obliged himſelf to pay back to Hayſtoun the ſums received, with the ſecurity granted by the Earl of Crawfurd, ſo that if he ſhould not procure the ſaid ratification and remiſſion, he and the ſaid Hayſtoun were each of them to be in their own places, as if there had been no agreement.*

The earl having aſſigned two of theſe bonds to Sir William Sharp, he in 1671 brought legal diſtreſs againſt Hayſtoun for payment of one of them, which then became due, and which in conſequence thereof Hayſtoun paid. No ratification of the earl's diſcharge, or remiſſion by the Crown, had been granted in the mean time, nor were any ſuch granted during the earl's life; and no farther demand was made on the other three bonds, during the lives of the earl and Hayſtoun.

The earl's aſſignee, the appellant, afterwards brought an action before the Court of Seſſion againſt William Gray of Invereighty, the reſpondent's father, the cautioner in the ſaid bonds, and upon his deceaſe againſt the reſpondent himſelf. The reſpondent pleaded in defence, that the bonds were become void upon non-performance of the quality in the back bond to procure and deliver the ratification on or before the 10th of November 1670. The appellant anſwered, that this was a penal irritancy, purgeable at any time, and which was actually purged by the ſon of the ſaid earl, who had procured a ratification and remiſſion ſome time after; and, further, that Hayſtoun, by paying up one of the bonds in 1671, after the irritancy was incurred, had homologated the bargain, and diſpenſed with the irritancy, which the reſpondent could not therefore inſiſt upon.

The

The Court on the 1ſt of January 1725, "Found that the reſolu-
" tive clauſe in the back bond, is no penal irritancy, and therefore
" not purgeable upon performance after elapſing of the day; and
" found that the payment made, after the ſaid day was not a
" paſſing from the reſolutive clauſe; but that Hayſtoun could at
" any time after the ſaid payment inſiſt to be reponed to his own
" place." And on the 5th of February thereafter, the Court
" adhered to their former interlocutor, and refuſed the deſire of
" the petition."

Entered, 3 Feb. 1725-6. The appeal was brought from "an interlocutor and decree of the
" Lords of Seſſion of the 1ſt of January 1725, and the affirmance
" thereof the 5th of February following".

The appellant, from the reſpondent's caſe, appears to have contended, 1ſt, that this was a penal irritancy, and purgeable; 2d, that Hayſtoun had homologated the tranſaction by payment of one of the bonds, in 1671 after the day of performance on the earl's part was elapſed; 3d, that it was again homologated in 1677, when Hayſtoun ſold his eſtate, ſubject to the payment of the bonds to the Earl of Dumfermline; and 4th, that Hayſtoun's claim to be reponed, after payment of one of the bonds, was cut off by preſcription.

Heads of the Reſpondent's Argument.

Though penal irritances are generally *purgeable* yet a clauſe inferring no penalty, but only *reſolving a bargain*, and putting the parties in the ſame caſe they were in before the bargain was ſtruck, as in the preſent caſe, neither was nor ever can be found penal or purgeable; if on the omiſſion to perform, it had been provided, that beſides the reſolution of the bargain, the party ſhould forfeit a ſum of money, that forfeiture would clearly amount to a penalty, which in ſome caſes might be purgeable; but when no ſuch forfeiture is induced, and when no other hardſhip is ſtipulated, than that either party ſhould be in as good circumſtances as before the bargain was made, it is impoſſible that ſuch a condition can be deemed penal. It is not the damage of the party which comes to be conſidered, where contractors have made it a plain, explicit proviſion, as in this caſe.

Though Hayſtoun, for ſeveral reaſons, and after lapſe of the day, was willing to ſtand to the bargain, as might be inferred from his payment of one of the bonds; yet the bargain he was inclined to ſtand to, was a contract which obliged the earl alſo to performance of his part, and gave to Hayſtoun a ſecurity for repayment of the ſums advanced in caſe the earl did not *ſpecifically* perform. And though it ſhould be concluded that Hayſtoun diſpenſed with the non-performance to that period, yet it cannot be imagined, that he diſpenſed with the non-performance thereafter, nor for one minute longer than the date of the act of approbation Beſides, he undoubtedly believed himſelf liable to be queſtioned for his life, as well as his fortune, when he agreed to give away ſo great a ſum as 30,000 merks for a ratification and remiſ-

ſion;

ſion; and ſo long as theſe were not procured, ſo long in his apprehenſion the danger remained, and knowing himſelf unable to ſtand the attacks of his *purchaſed* friend, as well as of others his foes, he could not in prudence fall out with him, the neceſſary conſequence of his refuſing payment of the bond. If that payment then, were the fruit of fear, and not of choice in Hayſtoun, it would be unreaſonable from that involuntary act, to draw the conſequences which only follow from the free and voluntary conſent of parties.

When Hayſtoun ſold his eſtate, and referred to a liſt of debts, which the purchaſer ſhould be taken bound to pay, it was neceſſary that the ſaid bonds ſhould be inſerted in the liſt, becauſe by an inhibition uſed by the creditor, they had become real debts on his eſtate. In the diſpoſition made of the eſtate of Hayſtoun, it is provided, "That whatever eaſe by compoſition or compenſation beis obtained by the ſaid Mr. Patrick Lyon (the purchaſer) "by friendly or amicable agreement, or *legal ſentence* from the "repreſentatives of the ſaid earl of the ſums *given up to be reſting* "by the ſaid William Grays elder and younger, expreſſed in the "liſt and inventory of their debts mutually ſubſcribed by them, "the ſaid Mr. Patrick Lyon obliges himſelf to keep account "thereof, and apply the ſame to the uſe and behoof of the ſaid "William Gray younger." From this clauſe, it is obvious, that Hayſtoun intended to quarrel this debt, which he ſtates only to be *given up as reſting*, but does not ſay it was due. This further ſhewed that Hayſtoun at that time had a ſettled reſolution to inſiſt upon the back bond.

The reſpondent's right to be reponed, or the cauſe and foundation of that right, viz. the reſolving of the bargain, gave him two diſtinct claims and intereſts; one, to have the money reſtored which he had paid; the other, to deny payment of the bonds, which by the irritancy incurred became void. It was plain he could not attain the firſt, without a ſuit for repetition, which after a lapſe of 40 years would be barred by preſcription: but the *ſecond* being *a right of exception*, could not periſh by preſcription, but muſt remain perpetual, and endure as long as the bonds could poſſibly laſt.

The reſpondent made it appear by the writings themſelves, that, the earl had no right or patrimonial intereſt in theſe ſums; that his commiſſion was only to tranſact and compound; that he was accountable to the Crown for his receipts; and that he had therefore no authority to take the bonds in an underhand hidden manner to blank perſons, thereby to cover the extent of his receipts. It was plain therefore, that neither in law nor in equity had he a demand for one ſhilling.

This day being appointed to hear counſel, counſel appearing for the reſpondent, but no counſel for the appellant; and the reſpondent's counſel being heard, and being withdrawn, the anſwer of the reſpondent was read, and conſideration had of what was offered in this cauſe: *It is ordered and adjudged, that the appeal be diſmiſſed,* Journal, 13 Feb. 1726-7. Judgment.

dismissed, and that the interlocutor and decree, and the a thereof, therein complained of, be affirmed: and it is further that the appellant do pay or cause to be paid to the respondent of five pounds for his costs in respect of the said appeal.

For Respondent, *Dun. Forbes.*

Case 133. Kaims, 18 Jan. 1726.

William Nisbet of Dirleton, Esq; eldest Son of William Nisbet, Esq; deceased, by his first Wife, and Executor of his said Father, - - - - - - *Appella*

Janet, Jane, and Willielmina Nisbet, Daughters of the said William Nisbet, deceased, by his second Wife, by Mr. David Erskine of Dun and Others, their Tutors and Curators, - - - - - - *Respondents*

7th *March* 1726.

Legitim—Husband and Wife—Provisions to Heirs and Children.—Equal Portions to children in a contract of marriage, if not so expressed, do exclude their right of legitim.

Upon a wife's renouncing her thirds, by the contract of marriage, division of the personal estate is bipartite, one half legitim, the other dead's part.

Provisions to children, in this case, do not come off the whole head executry as a debt; but they are first to impute the legitim pays these portions, and take the rest as a debt from the deads part if need

Bonds fall under legitim

WILLIAM NISBET, late of Dirleton, deceased, had first wife the appellant, his eldest son and heir, W second son, and three daughters.

By contract executed in April 1711, previous to Mr. marriage with his second wife, the mother of the resp consideration of the lady's fortune, which was consi settled upon her lands, to the value of 4000 merks per her jointure, in full satisfaction for her dower, third of or others which she might claim by law, in case she sho her said intended husband: and by the same contract himself to lay out the sum of 100,000*l.* Scots in the p lands to be settled upon himself in life-rent, and the l to be procreated of the said intended marriage in fee; bu should be no heir male of the said marriage, but daughte Nisbet bound himself and his heirs to pay the several sums ing; if but one daughter, the sum of 36,000 merks; i daughters, the sum of 50,000 merks; and if three or daughters, the sum of 60,000 merks, to be divided as the

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William Niſbet ſhould think fit, and payable, after his deceaſe, at the daughters' reſpective ages of eighteen or marriage, with intereſt from that time; and till the ſame ſhould be payable, he covenanted to maintain, educate, and aliment the daughters according to their quality; with proviſo, that the ſhares of daughters dying ſhould go to ſurvivors; but if one daughter only ſhould ſurvive, ſhe ſhould have 40,000 merks. There was no proviſo, or clauſe in this contract, that the ſums provided to the daughters ſhould be held to be in full of their legitim.

In July 1718, William the father made his will, naming the appellant his eldeſt ſon executor, and univerſal reſiduary legatee, and diſponing his whole moveable eſtate in his favour, with the burthen of certain legacies, and with a proviſo, that the teſtament ſhould not derogate from the proviſions granted to his other children.

In September 1722, when there was iſſue of the ſecond marriage, one ſon David, and two daughters Janet and Jane, two of the reſpondents, William the father, in purſuance of the marriage contract, diſponed certain lands of the value of 100,000*l.* Scots and upwards, in favour of the ſaid David and the heirs male of his body; whom failing, to the other heirs male of the marriage; whom failing, to Walter Niſbet his ſecond ſon of the firſt marriage. And of the ſame date, he granted a bond of proviſion to the reſpondent Janet his eldeſt daughter, for payment of 12,000*l.* Scots to her, at the firſt term after his deceaſe, with intereſt thereafter, which he declared to be a burden upon the 100,000*l.* Scots provided to the heir male of the ſecond marriage; and that it ſhould be in full of her portion natural, and of all ſucceſſion ſhe could claim through her father's deceaſe, or her mother's contract of marriage. On the 28th of March 1724, he granted a bond in ſame terms to his daughter Jane for 9600*l.* Scots.

David, the eldeſt ſon of the ſecond marriage, died before his father, whereby his proviſion went to Walter the ſecond ſon of the firſt marriage; and the bonds of proviſion to the two daughters became void. William the father afterwards died in October 1724, leaving his wife pregnant of the reſpondent Willielmina, born a few months after her father's death; for her no ſpecial proviſion had been made by the father.

After the father's death, the reſpondents brought an action againſt the appellant before the Court of Seſſion, in which they claimed the 60,000 merks ſpecified in their mother's contract of marriage, as a debt upon the appellant; and alſo a moiety of the reſidue of the clear perſonal eſtate as their legitim. The appellant pleaded, that the legitim was only due to children who had no other proviſion, and that the reſpondents were excluded from legitim by the proviſions made for them in their mother's contract of marriage. The reſpondents in anſwer contended, that theſe proviſions were not given or to be accepted of in full of legitim, but were only to ſecure a certain ſum to the children in all events, but not to deprive them of their legal proviſions.

The Lord Ordinary, on the 17th of July 1725, "Found that "the proviſions in the marriage-contract in favours of the re- "ſpondents did not exclude the legitim." And the appellant having reclaimed, the Court adhered to the Lord Ordinary's interlocutor on the 2d of December 1725.

The appellant having petitioned againſt this interlocutor, after anſwers thereto, the Court, on the 18th of January 1726, "Found that the deceaſed's moveable eſtate admitted only "a bipartite diviſion, betwixt the children's *legitim* and the "deceaſed's *deads part* by equal portions: and found, that "the proviſions of the deceaſed's contract of marriage in fa- "vour of his children the reſpondents muſt come off the "whole head of the executry as a debt; and that what re- "mains after payment of theſe proviſions and of the deceaſed's "other moveable debts, the children come to have a right to "the equal half thereof as their *legitim*." The appellant having petitioned againſt this interlocutor, the Court, on the 8th of February 1726, "adhered to that part of the former interlocutor "finding that the deceaſed's moveable eſtate admits only of a "bipartite diviſion betwixt the children's *legitim* and the de- "ceaſed's *deads part* by equal portions; and found, that the "reſpondents had a ſhare in virtue of their legitim to the half of "the principal ſums in bonds due by the deceaſed." And after a hearing on the point of the *collation* contended for, the Court, on the 11th of ſame month, "Found that the proviſions of the "deceaſed's contract of marriage in favours of his children the "reſpondents, muſt come off the whole head of the executry "as a debt; and therefore adhered to their former inter- "locutor."

Entered, 22 Feb. 1725-6.

The appeal was brought from "an interlocutory ſentence of "the Lord Ordinary, made the 17th of July 1725, and the af- "firmance thereof by the Lords of Seſſion the 2d of December "following; as alſo from ſeveral other interlocutory ſentences "of the Lords of Seſſion, of the 18th of January, 8th of Febru- "ary, and the 11th of ſame February 1726.

Heads of the Appellant's Argument.

The teſtator in his contract of marriage with the reſpondents' mother, having obliged himſelf, his heirs and executors, to pay 60,000 merks to the daughters of the marriage, the reſpondents can claim no more than that proviſion, which the appellant, as heir to his father, would have been obliged to pay them, if the perſonal eſtate had not amounted to that ſum. It is indeed true, that a father may make proviſions to his children by bonds, or other voluntary deeds, which will not exclude their legitim unleſs ſo expreſſed, becauſe of the preſumed intention of the father to reſerve to them ſuch a claim; but where proviſions are made by contract, before marriage, in the way of ſtipulation with the intended wife and her friends, fixing the ſhare of the father's perſonal eſtate to which the children are to ſucceed; in that caſe, as the

the father's eſtate is obliged, in all events, to pay them the proportion ſtipulated in the contract, ſo he is left at liberty to diſpoſe of the reſt as he pleaſes.

2°. If the reſpondents were not barred by the proviſions made for them, in the mother's contract of marriage, yet theſe proviſions behove to be imputed to the legitim (*i. e.* muſt be reckoned as part of it), and the children could, in ſo far only as theſe proviſions fall ſhort, have an action of ſupplement. That this was the rule in the Roman law cannot be a queſtion; therefore, as this doctrine of legitim was wholly derived from thence, it ought to determine the preſent caſe, if it were not ſufficiently eſtabliſhed by the law of Scotland. Bonds of proviſion granted to children, or portions given with daughters at their marriage, were always imputed in payment of their legitim. The Lord Stair, and Sir George Mackenzie, ſtate this as a ſettled point in the law of Scotland, as founded in the nature of the thing. The law gives a legitim to the children for their proviſions; but does not exclude the father's paying this legitim, either in whole or in part, during his life; and every indefinite payment or proviſion made, during the father's life, muſt be imputed towards ſatisfaction thereof, from the undoubted maxim of law, that, *debitor non præſumitur donare.*

Stair's Inſt. B. 3. tit. 8. § 45. Mackenzie's Obſerv. 10 Act Parl. 3 Car. 2.

All the Scots lawyers agree, that when there is a relict ſurviving, as in the preſent caſe, the executry is *tripartite*. To ſuch legitim the children have a right by ſucceſſion, and not from any communion or joint intereſt in their father's eſtate. And it is *jus tertii*, for the children to queſtion which way their father has diſpoſed of two thirds; and of this there is an expreſs precedent in the caſe of Allardice *v.* Smart, affirmed in the Houſe of Lords 12th February 1721-2, where a proviſion of 24,000 merks was made, in a contract of marriage, to the children of the marriage: the father having tranſacted with ſome of the children for ſmall ſums, the Court of Seſſion found the benefit of thoſe tranſactions did not accreſs to the remanent children; and although in that caſe the children had a joint intereſt, yet the *jus accreſcendi* did not obtain.

Allardyce *v.* Smart, No. 90. of this collection.

But the *jus relictæ* ariſes from the joint communion betwixt the huſband and wife, and the legitim being a debt upon the father to provide ſuch a ſhare of his eſtate to his children, after his deceaſe, whenever that debt comes to be diſcharged, and the joint eſtate of the huſband and wife is diſburthened thereof, an equal diviſion betwixt the relict and executor muſt neceſſarily happen; and all the lawyers who have ſaid that when the wife predeceaſeth, the executry is at any time *bipartite*, have conſidered the caſe in this light, viz. that upon the wife's demiſe, her executors have claimed a third, whereby only two thirds remain under the father's adminiſtration, to be divided, upon his deceaſe, betwixt the children and his executors; ſince, then, the wife's executors can claim, and are preſumed to have claimed her third, and the children dying before their father are no more conſidered than if

they never had exiſted, the reaſoning cannot reciprocally hold from the one to the other.

By the act of parliament 1669. c. 19. there is no more intended than a regulationof *quots* payable to the biſhop; and all the lawyers who have written on the ſubject, particularly Sir Geo. Mackenzie, have put no other gloſs upon it. The legiſlature might certainly tax what part of a man's moveable eſtate they thought fit; but ſuch taxation could never regulate the ſucceſſion of moveables otherwiſe eſtabliſhed.

Heads of the Reſpondents' Argument.

The intention of the marriage-articles was, no doubt, in all events, to ſecure a certain proviſion for the daughters, becauſe it might be uncertain what the perſonal eſtate of their father might amount to at the time of his deceaſe; but that was by no means to exclude them from the proviſion the law makes for them; for had the intention of the parties been ſuch, it would have been ſo expreſſed, but it not being mentioned to be in excluſion of their legitim they are entitled to both. This is the unanimous opinion of all the lawyers of Scotland, particularly Ld. Stair's Inſt. tit. Executry, § 45. Sir John Niſbet, fo. 9. Sir John Stewart, fo. 14. and 132.

The father has a right to, and is the common adminiſtrator of all the perſonal eſtate during his life only: at his death the perſonal eſtate is ſubject to be divided according to the direction of the law. If, therefore, it excludes the wife's right by a ſettlement upon her, that does not veſt her right in the huſband, but the perſonal eſtate of the father, which otherwiſe would have been divided into thirds, will be divided into moieties. If there are children who have accepted of a proviſion in lieu of their legitim, that does not give the benefit of their ſhare to the huſband, but the wife in that caſe is entitled to a moiety; and there is the ſame reaſon, that where the wife accepts of a ſettlement in lieu of her third, the children ſhould have the benefit of that, and be entitled to one moiety.

By the inſtructions given to the commiſſaries in confirming of teſtaments, the rules of diſtribution are laid down thus: If there are no children, or only children that are *foris-familiat* (that is, have accepted of a portion in full of their legitim), the teſtament is to divide in two; and though the caſe of a wife's renouncing is not expreſsly taken notice of, yet the reaſon is the ſame; for ſince the non-exiſtence and renunciation of the children are put upon the ſame footing, the ſame reaſon holds where there is no wife, or where ſhe has renounced; if there was no wife, the diviſion would be in moieties; if ſhe had renounced, the diviſion ought to be the ſame; and ſo it is in the caſe of children, and the practice of the Commiſſary Court is the ſame in both caſes. By the act 1669 c. 19. it is enacted, "That the commiſſaries admit of no diviſion in teſtaments in favours of the widow who "has renounced, and if a bipartite or tripartite diviſion be prayed

"by the executor at the confirmation upon her account, if it "ſhall appear ſhe has renounced, the teſtament ſhall be con-"firmed without diviſion upon her account." Conſequently, ſince ſhe is excluded, and no diviſion to be made on her account, the diſtribution muſt be in the ſame manner as if there was no wife, that is by moieties. Nor will it alter the caſe that the proviſion made for the wife is out of a real eſtate, and conſequently a fund out of which the children could have no legitim; for if a real eſtate were given to younger children and accepted by them in ſatisfaction of their legitim, their renunciation would have the ſame effect as if ſo much of the perſonal eſtate had been paid them; and ſo if the huſband ſells a real eſtate, though the widow and children would have had no intereſt therein, if it had not been ſold, yet the price becomes perſonal eſtate, and adds to that common fund in which the wife and children are ſeverally intereſted.

The appellant contended, that by act of parliament 1661, c. 32. bonds bearing intereſt are declared moveable as to ſome particular caſes, yet no notice is taken of the children's legitim, and therefore that they muſt, as to that, remain ſtill heritable, and conſequently not fall under the legitim. But theſe bonds are by the act declared moveable, that the ſame might fall to the executors, or belong to the neareſt of kin, that is making them moveable as to all effects; and the legiſlature having it in view to determine in what caſes they ſhould remain heretable, expreſſed it to be, *Quoad fiſcum & relictam*; as they determined in what caſes they were to be heretable, and there is no mention of the legitim, they muſt as to the children be conſidered as moveable. And ſince by this act they go to executors or neareſt of kin, excluſive of the relict, they muſt be divided wholly into legitim and dead's part.

Collation, or bringing into hotchpot, was only introduced as a remedy for preſerving an equality amongſt brothers and ſiſters, and concerns only the diviſion of the legitim betwixt them, but has no effect upon the extent of that legitim, nor upon the extent of the dead's part, or the widow's ſhare. The right to the legitim is not a ſucceſſion but a diviſion ariſing upon the death of the father, and exactly of the ſame nature with the third due to the widow; and ſuppoſing the widow ſhould by the marriage have a particular ſum ſettled to be paid her upon the death of her huſband, ſhe will not be obliged to bring that into hotchpot, or impute it *pro tanto*; no more ought the children what is provided for them. Eſpecially ſince the proviſion by the marriage-articles in favours of the reſpondents is to be conſidered as a debt, and as ſuch is to be paid before any diviſion can be made, for the diviſion operates only upon the reſidue of the perſonal eſtate after all debts paid, and if they are creditors they ought not to impute; and of the ſame opinion is Sir George Mackenzie, for he ſays, "If children get bonds of proviſion from their father, they are B. 3. tit. 9. "not thereby excluded from their legitim, nor are they obliged § 11. "to collate theſe bonds of proviſion, and to impute them as a part "of their portion natural, but they have right to them as mere

"creditors, and may likewiſe ſeek their legitim:" and thus it has been determined in ſeveral caſes.

Judgment, 7 March 1726-7.

After hearing counſel, *It is ordered and adjudged, that the interlocutory ſentence of the Lord Ordinary of the 17th of July* 1725, *and the affirmance thereof be affirmed; and it is further ordered and adjudged, that ſo much of the interlocutory ſentence of the 18th of January* 1726 *as appoints only a* bipartite *diviſion betwixt the children's legitim and the deceaſed's part by equal portions be affirmed; but that the other part of the ſame interlocutory ſentence whereby the Lords of Seſſion found "That the proviſions in the deceaſed's contract of marriage in "favour of the children, the plaintiffs, muſt come off the whole head "of the executry as a debt," be reverſed: and it is alſo ordered and adjudged, that the interlocutory ſentence of the 8th of February* 1726 *be affirmed; and it is hereby further ordered and adjudged, that the reſpondents have their full legitim as to the demands of the* 60,000 *merks, or any part thereof that may become due by the marriage-contract, when the ſame ſhall become due and be demanded; that that what ſhall have been received on the account of the legitim ſhall be accounted and imputed as payment* pro tanto *of the marriage contract.*

For Appellant, *P. Yorke.* *Dun. Forbes.*
For Reſpondents, *C. Talbot.* *Will. Hamilton.*

That part of the judgment here reverſed, relative to the children's proviſions being taken off the whole head of the executry as a debt, is given as an exiſting precedent by Lord Kaims in his Deciſions. I do not find this ſtated in the Dictionary, or in Bankton or Erſkine; but the judgment of the Houſe of Lords ſeems directly contrary to the doctrine laid down in Erſkine, B. 3. Tit. 9. § 22. on this point, ſupported by two deciſions, Dickſon, 19th June 1678, and Murray, 16th July 1678.

This caſe agrees more with the deciſion in the important caſe of Hog and Laſhley, in the Houſe of Lords, 7th May 1792, than the caſe of Allardyce *v.* Smart here mentioned does. The preſent, however, is not upon points preciſely ſimilar to theſe in theſe other caſes.

Patrick Haldane, Eſq; - - - *Appellant*;
Sir Alexander Anſtruther, Bart. Robert Lumſden of Innergellie, and Iſabel Lady Dowager of Innergellie, his Mother, Mr. Walter Wilſon, and Sir John Anſtruther, Bart. - - - - *Reſpondents.*

Caſe 134. Edgar, 29 Dec. 1724.

20th *March* 1726-7.

Sale.—By articles of agreement for the ſale of an eſtate, the diſpoſition was to be delivered by a day certain, and the price to be paid ten days afterwards; but the ſeller was not obliged to deliver the diſpoſition till heritable ſecurity was granted for the price.

The eſtate being much incumbered, the creditors are preferred to the price upon aſſigning their debts with abſolute warrandice.

ON the 6th of Auguſt 1720 the reſpondent, Sir Alexander Anſtruther, granted a factory to his lady, empowering her in his name to receive all ſums of money due to him, and to ſell and diſpoſe of any of his real eſtate, promiſing to ratify what ſhe ſhould do therein. By articles of agreement, bearing date the 17th of the ſaid month of Auguſt, entered into between Sir Alexander's lady and the appellant, ſhe ſold to the appellant the lands of New Grange, and others therein mentioned; and became bound, that Sir Alexander ſhould execute a proper conveyance of the premiſes, with abſolute warrandice, to the appellant, his heirs and aſſignees, with an aſſignation to the rents for the year 1720, to be delivered to the appellant on or before the 1ſt day of November then next, with a ſufficient progreſs of writs: in conſideration whereof the appellant became bound to pay to the reſpondent Sir Alexander the price of the ſaid lands, at the rate of 30 years' purchaſe, conform to a rental to be given in thereof; the appellant, at the execution of the articles, paid 7000 merks to Sir Alexander's lady, and agreed to pay the reſidue of the price on or before the 11th day of the ſaid month of November.

The appellant was immediately let into the poſſeſſion of, and continued to poſſeſs the premiſes, and receive the rents thenceforward. By a rental delivered to him, it appeared, that he was to pay the ſum of 19,021*l.* 1*s.* 8*d.* Scots over and above the ſum paid by him at the execution of the articles. On the 21ſt of September 1720, Sir Alexander executed a diſpoſition and conveyance of the premiſes, which was tendered to the appellant before the 1ſt of November that year; but application being then made to the appellant to give a real ſecurity upon the ſame lands for the price, which was payable eleven days after, the appellant refuſed to accept the diſpoſition under the condition inſiſted on relative to the ſecurity.

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The reſpondent Sir Alexander being much encumbered with debts to the reſpondents and ſundry other creditors, the reſpondents arreſted the price in the appellant's hands, and afterwards brought an action of forthcoming againſt him. The appellant alſo brought an action of multiple poinding, in which various proceedings were had, and interlocutors pronounced, on the ſubject of the preferences of the creditors upon the price, not neceſſary to be detailed.

The appellant afterwards brought an action for reduction of the ſaid articles, upon the ground that the diſpoſition was not delivered to him at the day limited, and becauſe the premiſes were encumbered and the title thereto not clear. The cauſe coming to be heard before the Lord Ordinary, his lordſhip, on the 31ſt of January 1723, "Found that the creditors of Sir "Alexander muſt purge or clear the incumbrances, as alſo pro- "duce in court the writs of the lands of New Grange, before "the decree in their favour be extracted." And after further proceedings, the Court, on the 30th of December 1724, "Found "the ſaid articles a binding contract upon the appellant, the ſaid "Sir Alexander producing his brother's infeftment, and a ſuffi- "cient progreſs, unleſs the appellant could condeſcend upon in- "cumbrances that would exclude his right; but before payment "of the price, found that all the creditors ought to be brought "into the multiple poinding now depending, in order to be "diſcuſſed."

The appellant having ſtated in debate, that his right was excluded by adjudications led on the premiſes of a date poſterior to the articles, the Lord Ordinary, on the 20th of July 1725, "Found that the right made by Sir Alexander Anſtruther to the "appellant of the lands of New Grange is not excluded by the "poſterior adjudications." One of the creditors, adjudgers, having reclaimed againſt this interlocutor, the Court, on the 11th of November 1725, "having conſidered that the bargain of ſale "had taken effect, refuſed the deſire of the petition, and adhered "to the Lord Ordinary's interlocutor."

And it having been remitted to the Lord Ordinary to hear parties upon the warrandice to be given by the creditors arreſters upon their receiving their money, his lordſhip, on the 7th of January 1726, "Ordained the creditors, upon payments of their debts, "to diſcharge the appellant of ſo much of the purchaſe-money "as the ſaid debts amounted to, with abſolute warrandice, and "for his further ſecurity to aſſign their debts to Mr. Haldane, ſo "far as the ſame might affect his purchaſe, for his further ſecu- "rity thereof allenarly; and ordained the decree to go out and "be extracted accordingly."

Entered, 3 Feb. 1725-6.

The appeal was brought from "ſeveral interlocutory ſentences "of the Lords of Seſſion, of the 18th of July 1722, the 31ſt of "January, the 9th of July, and 26th of December 1723, the "13th of February, the 18th of June, the 2d and 30th of De- "cember

cember 1724, the 23d of June, the 20th of July, and 18th of November 1725, and the 7th of January 1726 (*a*).

Heads of the Appellant's Argument.

This bargain was not performed on Sir Alexander's part on the 1ſt of November 1720, nor at any time thereafter; on the contrary, he refuſed to deliver any conveyance to the appellant except upon the terms of having the purchaſe-money paid or ſecured to him at the time of delivery; though by the articles of agreement the conveyance was to have been delivered ſome days before the price became due, to give the appellant an opportunity of examining into the ſufficiency of the right; and eſtabliſhing his own title before he paid the money.

The admitting of a few of Sir Alexander's perſonal creditors to perform the articles for him is a great ſtretch of the articles to the diſadvantage of the appellant. For the warranty appointed to be given to the appellant is not ſuch as he is entitled to by the articles, that being one warranty for the quiet poſſeſſion of the lands, whereby the appellant might have affected the whole other eſtate of Sir Alexander; but theſe are ſeveral warranties, not for ſecuring the purchaſe, but only for refunding certain parts of the purchaſe-money to be taken from Sir Alexander's different creditors, ſome of whom have no eſtates, or but very ſmall ones, liable to be affected by ſuch warranties.

Heads of the Reſpondents' Argument.

The appellant, immediately upon the execution of the articles, was let into the poſſeſſion of the premiſes, and is now in poſſeſſion thereof, and has received all the rents and profits to his own uſe. Though the price was not to be paid till the 11th of November, yet nobody is obliged to deliver an abſolute conveyance to an eſtate, without having the price paid or ſecured; and all that was deſired of the appellant was only to give an heritable ſecurity, upon the premiſes ſold, for ſecuring the payment of the price, not to the reſpondent Sir Alexander, but to ſuch of the reſpondents, Sir Alexander's creditors, as had the prior incumbrances affecting the premiſes ſold.

All the creditors of the reſpondent Sir Alexander, claiming any right to the premiſſes, are parties to the ſuit: their ſeveral rights have been produced, and conſidered by the Judges, who have determined the priority in which the creditors are to be paid; to this determination the creditors have ſubmitted, and no complaint is made by any of them. There ſeems, then, no occaſion for the appellant to make uſe of this as a handle againſt paying the price, eſpecially ſince the Judges have directed, that the creditors ſhall not only aſſign their debts to the appellant to protect the inheritance; but that the ſeveral creditors, upon payment, ſhall give abſolute warranty: the effect of which is, that they

(*a*) It appears to be unneceſſary in this caſe to detail the numerous interlocutors, which chiefly related to the preferences of the creditors.

ſhall

ſhall be obliged to indemnify the appellant, as to any demands, ſo far as relates to the ſeveral ſums to them reſpectively paid, which is rather a confirmation of the appellant's title, than any prejudice to it.

Judgment, 20 March 1726-7. After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed; and that the ſeveral interlocutory ſentences therein complained of be affirmed.*

For Appellant, *P. Yorke. J. Willis.*
For Reſpondents, *Dun. Forbes. C. Talbot. Will. Hamilton.*

Caſe 135. Elizabeth Ducheſs of Hamilton, - - *Appellant;*
James Duke of Hamilton, - - - *Reſpondent.*

29th *March* 1727.

Proceſs.—A widow brings an action againſt her ſon, as his father's heir, to make good a jointure, which ſhe alleged was deficient: the ſon contends that the purſuer had not implemented her part of the marriage-articles, and calls upon her to produce her duplicate of them; ſtating that the other duplicate was produced by him in a ſuit between the parties in Chancery in England: ſhe declining to do this, is ordered before anſwer to produce her part of the marriage-articles.

THE appellant in the year 1722, brought her action againſt her ſon the reſpondent, ſetting forth: That previous to her marriage with James late Duke of Hamilton, he by his bond of proviſion, bearing date the 15th of July 1698, for and in conſideration of the ſaid marriage, and of the appellant's portion of 10,000*l.* ſterling, of which he acknowledged the receipt, bound and obliged himſelf, his heirs and ſucceſſors, to provide and ſecure the lands and baronies of Kinneil, Caridden and Abbotſcarſe, with the caſtles, towers, fortalices, and pertinents, therein particularly mentioned and deſcribed, to the appellant in life-rent for her jointure, during all the days of her lifetime, and to infeft and ſeiſe her in life-rent therein; and the duke warranted theſe lands, baronies, and others to be then worth, and to be worth and pay yearly at the appellant's entry thereto, and during her lifetime the ſum of 1500*l.* ſterling, by and attour the manor-place of Kinneil; and he bound himſelf to free and relieve the appellant yearly during her lifetime of all feu duties, blench duties, teinds, miniſters' and ſchoolmaſters' ſtipends, building and repairing of manſes, repairing of churches and church-yard dikes, and the king's ordinary taxation:

That the ſaid duke not being himſelf infeft in the ſaid lands, baronies, and others in 1702, joined with his mother Ann late Ducheſs of Hamilton, in whom the feudal right was veſted, in executing a confirmation of the ſaid bond of proviſion, containing a precept of ſeiſin, upon which the appellant was accordingly infeft:

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That the ſaid duke died in November 1712, leaving the reſpondent his eldeſt ſon and heir; and Ann Ducheſs of Hamilton died in October 1716, and upon her death, the appellant became entitled to the poſſeſſion of the ſaid jointure, lands, baronies, and others:

That the appellant having entered upon the ſame, found that they were not worth above 1000*l.* ſterling per annum, clear of all deductions; ſo that the appellant ſuffered the loſs of 500*l.* ſterling per annum: and her action concluded, that the reſpondent ſhould make payment to her of the *intake* of 500*l.* per annum ſince ſhe had been entitled to her jointure, and in time coming, agreeably to the bond of proviſion, and deed in confirmation thereof; and that the appellant ſhould alſo be quieted in the enjoyment of the ſaid lands, baronies, and premiſes.

The reſpondent ſtated for defences in this action, that by the articles of marriage executed between the appellant and his father, the appellant was bound to ſettle her eſtate in England in favour of a truſtee for the behoof of the eldeſt ſon of the marriage; but that the appellant had not fulfilled this obligation upon her part; and the bond of proviſion libelled on having been of ſame date, and granted in part performance of theſe marriage-articles, the ſeveral proviſions in which, in favour of each party, were the mutual cauſes of one another, he contended that no proceſs could be ſuſtained at the appellant's inſtance on the bond of proviſion, until ſhe ſettled her Engliſh eſtate in the manner agreed on by the marriage-articles. Of theſe marriage-articles he produced, what he ſtated to be, a copy, mentioning that his father's part or duplicate thereof was produced by him in a ſuit in Chancery in England between the appellant and him: and he contended that ſhe ſhould produce her part or duplicate of theſe marriage-articles.

This cauſe was reported by the Lord Ordinary, and having been argued before the Court, their lordſhips on the 8th of December 1724 "Before anſwer ordained the appellant to produce "her part of the principal marriage-articles."

The appeal was brought from "an interlocutor order of the "Lords of Seſſion of the 8th day of December 1724." Entered, 1 Feb. 1726-7.

Heads of the Appellant's Argument.

The appellant ought not to be obliged to produce before the Lords of Council and Seſſion her part of the marriage-articles, but the reſpondent having a part thereof in his own cuſtody, and having admitted the ſame in the proceedings, if he intended to have any benefit thereby in the ſaid action, it was incumbent upon him to produce the ſame; and if the fact had been that the reſpondent's part of the marriage-articles was produced, and then lying before the Court of Chancery of England, in a ſuit betwixt him and the appellant (as was alleged on the reſpondent's part), yet that would not have been a ſufficient foundation whereon to ground the interlocutor; for it would be as neceſſary for the appellant to have her part of the ſaid marriage-articles in England

to

to make her defence in the ſaid ſuit, as for the reſpondent to have his part.

If this rule be admitted, it will follow that if any perſon being in England is forced to ſue in the courts of juſtice in Scotland, and the defender thinks fit to allege ſome articles or ſettlements concerning the title to the purſuer's eſtate in England, though not ſtrictly in iſſue in the cauſe, ſuch purſuer muſt be for ever ſtopped in his ſuit, unleſs he ſends down the title-deeds of his eſtate in England to be produced before the Judges in Scotland.

Heads of the Reſpondent's Argument.

If an action is brought for the performance of an agreement, and the defender inſiſts that the purſuer has a deed in his poſſeſſion which will be a bar to the ſuit, or ſtay the proceedings therein, the purſuer ought to be decreed to produce that deed; and it is the conſtant and daily practice in the Court of Seſſion ſo to do. If the purſuer does not comply with ſuch direction, he has himſelf only to blame that the ſuit is at a ſtand: and as the appellant does not pretend ſhe has not a part of theſe articles, ſo, had ſhe produced them, the ſuit might have been at an end before this time. The reſpondent's part of the ſaid articles was then in England, and could not be produced at that time; but he produced a copy of the articles, and was willing it ſhould be taken as a true copy; and if the appellant would have agreed to that, the neceſſity of even her producing the articles might have been ſaved; but that was not agreed to.

Judgment, 29 March 1727. After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutory order therein complained of be affirmed.*

For Appellant, *P. Yorke.* *J. Strange.*
For Reſpondent, *Dun. Forbes.* *C. Talbot.* *Will. Hamilton.*

Simon Lord Lovat, - - - *Appellant*; Caſe 136.

Sir James Mackenzie, of Royſtoun, one of the Senators of the College of Juſtice; Roderick Mackenzie, ſecond Son of Alexander Mackenzie, late of Fraſerdale, and his Guardian; Mrs. Emilia and Margaret Fraſers, Daughters of the ſaid Alexander Mackenzie, and the ſaid Alexander Mackenzie as their Guardian; Mr. William Scott, Profeſſor of Greek in the College of Edinburgh, and his Children; Alexander Mackenzie of Garloch; Roderick Macleod of Cadboll; Kenneth Mackenzie Writer in Edinburgh; and John Paterſon of Preſtonhall, Eſq; *Reſpondents.*

13th *April* 1727.

Donator of Eſcheat competing with a Truſtee.—A father conveys his eſtates to a truſtee for certain purpoſes; after the father's death, the truſtee ſells part of his eſtates, and bond for the price is taken in the name of the truſtee's ſon, who of ſame date grants a back bond to the truſtee, in terms of the father's truſt deed; the ſon is afterwards denounced for treaſon, and his eſcheat granted to a donator; but he ſubſequently grants an aſſignation to his father's truſtee, which, in a competition with the donator, is ſuſtained.

Truſtee.—The creditors of a truſtee could not affect the truſt eſtate.

Competition of Creditors and Children.—Certain creditors being preferred to a ſum ſet apart for children's proviſions, the creditors are ordained, upon receiving payment, to convey their rights to the children, to enable them to operate relief on other ſubjects of the debtor.

Conſent of Party.—The donator who conſented to a decree of preference to the children, having contended that this conſent did not extend to the creditors, who were preferred to the children, and petitioned to be heard againſt them, the prayer is refuſed.

Coſts.—An affirmance with 60*l.* coſts.

ON the 11th of May 1710 Roderick Mackenzie of Preſtonhall, one of the ſenators of the College of Juſtice, by a deed executed, with conſent of Dame Margaret his ſpouſe, and of Alexander Mackenzie of Fraſerdale, his only ſon, conveyed his eſtate of Preſtonhall abſolutely to Sir James Mackenzie of Royſtoun, one of the ſenators of the College of Juſtice: the diſpoſition declared it was granted to the end the ſaid eſtate might be ſold, and the price thereof applied towards the relief of Lord Royſtoun in the engagements he had or ſhould come under for Lord Preſtonhall, in the firſt place; towards payment of the creditors who had real rights affecting the premiſes in the ſecond place; and laſtly, for the ends and uſes mentioned in a back bond executed by Lord Royſtoun, of ſame date with the diſpoſition. Lord Royſtoun, of ſame date, accordingly executed this back bond, reciting the ſaid diſpoſition, and binding himſelf not to ſell or diſpoſe of the ſaid eſtate, but with the conſent of Lord Preſtonhall, while in life;

life; and after his death, with consent of Dame Margaret his spouse, Alexander his son, and George Earl of Cromarty, or any two of them, or the survivor of them, and to apply the price for payment of the debts in which he himself was bound in the first place; for payment of real creditors affecting the premises in the second place; and to lay out 40,000*l.* Scots of the remainder upon some real security for the jointure of the said Dame Margaret during her life; and in case of her predecease the fee thereof was provided to Lord Prestonhall himself, or to such person or persons as he should appoint by any writing under his hand; and failing such appointment, or in the event of his dying before his lady, in either of these cases the fee of the said sum was provided to Roderick Mackenzie, the second son of Alexander Mackenzie of Fraserdale, and Emilia and Margaret his two daughters, the grandchildren of Lord Prestonhall, in the proportion of 40,000 merks to Roderick, and 10,000 merks to each of his sisters.

Lord Prestonhall died in January 1712. He had received the rents till his death, and, till the estate was sold, his son Alexander Mackenzie of Fraserdale received the rents and profits. On the 9th June 1715, Lord Royston with the consent of Alexander Mackenzie (Dame Margaret and the Earl of Cromarty being then dead) sold and conveyed the premises to the respondent John Paterson, at the price of 91,400*l.* Scots. The purchaser being allowed to retain a sum equal to what would clear off the real debts affecting the estate, on the 22d of June 1715, granted his bond for the remainder, being 78,315⅓ merks, to the said Alexander Mackenzie. And, of same date, Alexander Mackenzie executed a back bond in favour of Lord Royston, reciting the disposition by Lord Prestonhall, Lord Royston's back bond, the disposition to Mr. Paterson, and bond granted by him for the price, and obliging himself either to apply the money due by Paterson's bond to the uses mentioned in Lord Prestonhall's disposition, or otherwise to assign Paterson's bond to Lord Royston, that he might apply the money to the same uses.

Alexander Mackenzie not having appeared and given security for his peaceable behaviour in terms of the act 1 G. 1. c. 20. *for encouraging all superiors*, &c., was, after this period, disinherited, and his single and life-rent escheat were forfeited to his majesty. In consideration of the appellant's services in suppressing the rebellion, his majesty, on the 23d of August 1716, made a grant of the said single and life-rent escheat to the appellant. And after this period, on the 23d of March 1717, Alexander Mackenzie, who got free of further consequences of his denunciation, executed, in favour of Lord Royston, an assignation of the bond granted by Mr. Paterson for the balance of the price of Prestonhall.

On the 14th of March 1722, Lord Royston assigned to the respondents Roderick, Emilia, and Margaret, the sum of 40,000 merks, being all the money remaining due upon the said bond of Mr. Paterson's, according to their respective interests. And thereupon Roderick, and Sir James Sinclair his curator, and Emilia and Margaret, by their father and administrator in law, brought

brought their action before the Court of Seſſion, againſt Mr. Paterſon, to recover payment of the ſaid 40,000 merks. Mr. Paterſon, in this action, admitted the debt, but pleaded that he was not in ſafety to pay, on account of the appellant's gift of eſcheat, and that arreſtments had alſo been laid in his hands by ſeveral creditors of Lord Preſtonhall, and of Alexander Mackenzie. The appellant, though not a party to this action, appeared at a calling of the cauſe, by his counſel, on the 16th of February 1724, who declared, "that he was inſtructed by the donator not "to object againſt the purſuer's obtaining decreet for payment "of the ſums libelled, and to conſent thereto."

The Lord Ordinary, on the 18th of February 1724, "Found, "that the back bond granted by Fraſerdale to the Lord Royſ-"toun, being relative to and of the ſame date with the bond for "the remainder of the price granted by Mr. Paterſon to Fraſer-"dale, both which bore date the 22d of June 1715, and was in "proſecution of a tranſaction anno 1710, between the deceaſed "Lord Preſtonhall and the Lord Royſtoun, which excluded all "ſuſpicion of colluſion, did affect and qualify the ſaid bond in "the perſon of Fraſerdale, as a truſt in his name for my Lord "Royſtoun's behoof, and for the ends and uſes mentioned in the "back bond; and that the ſame being prior to Fraſerdale's de-"nunciation, the ſaid denunciation could not prejudice the effect "of the ſaid back bond; and therefore the aſſignation granted by "Fraſerdale, and transference by the Lord Royſtoun in favour of "Fraſerdale's children, ſtood good, notwithſtanding of Fraſerdale's "denunciation prior thereto. As alſo, by reaſon of the ſaid "back bond, found, that none of Fraſerdale's creditors could "arreſt the ſubject of the bond in prejudice of the children's "right, acquired by the ſaid back bond: and therefore, and in "regard that the donator of Fraſerdale's eſcheat diſclaimed any "intereſt in the ſaid bond, and did not object againſt the pur-"ſuer's preference, decerned and declared in the terms of the "libel, at the children's inſtance, with the burden always of the "ſecurity of the purchaſed lands to Mr. Paterſon, according to "ſtipulation thereanent, and with the burden of purging the ar-"reſtments laid on in the purchaſer's hands at the inſtance of the "deceaſed Lord Preſtonhall's creditors."

Soon after, Mr. Paterſon brought his action of multiple poinding, againſt the arreſting and other creditors of Lord Preſtonhall, in which the appellant was alſo called for his intereſt. And the reſpondent, Mr. William Scott, on behalf of himſelf and his children as creditors of Lord Preſtonhall, brought an action of reduction and declarator againſt Lord Royſtoun, the grantee of Lord Preſtonhall, inſiſting that the diſpoſition to him was fraudulent, and ought to be ſet aſide, and that his debt ought to be paid out of the reſidue of the price due by Paterſon and the other reſpondents. The other creditors of Lord Preſtonhall made themſelves parties to this action of Mr. Scott's; and the ſame was alſo conjoined with the action of multiple poinding.

In theſe conjoined actions, ſeveral interlocutors were pronounced, preferring the creditors of Lord Preſtonhall to his grandchildren; and the queſtion of preference between theſe creditors themſelves, having been diſputed for near two years, the Lord Ordinary, on the 20th of July 1726, pronounced the following interlocutor: "Preferred Lord Royſtoun to as much of "the ſaid ſum reſting by Mr. Paterſon, and contained in the ſaid "bond granted by him, as would ſatisfy and pay him the ſum of "38,315½ merks, and intereſt thereof from Whitſunday 1715, "during the not payment (to which he reſtricted his payments "and engagements for Lord Preſtonhall) *primo loco*; and found "that the other creditors and the children, in the order of preference after mentioned, could only draw the 40,000 merks of "principal aſſigned to the children, and ſuch part of the intereſt "as was reſting ſince Whitſunday 1715, and the intereſt of the "ſaid ſum in time coming; and found it was inſtructed by the "ſaid bond, and condeſcendance given in by Mr. Paterſon, that "he was reſting of the price of the ſaid lands at Whitſunday "1715 (beſides the ſum for which the Lord Royſtoun was preferred as above) the ſum of 40,000 merks; and found him "liable to the ſaid creditors and purſuers for the ſaid ſum "and intereſt thereof from the ſaid term of Whitſunday during "the not-payment; and preferred certain creditors of Lord Preſtonhall in the order then ſettled *primo loco*. Preferred the ſaid "children of Fraſerdale, in the next place to the remainder of "the ſaid ſum found due by Mr. Paterſon, and decerned Mr. "Paterſon to make payment accordingly; and diſcharged all the "other perſons called by the multiple poinding to moleſt him on "that account in time coming: and decerned the ſeveral creditors preferred as above on the ſum transferred to the children, "to aſſign and give up their grounds of debt and diligences reſpectively in favour of the ſaid children, in order that they "might operate their relief out of any other ſubject or eſtate "which belonged to Lord Preſtonhall or Fraſerdale as accords "of the law."

The appellant now appeared as a defender to the multiple poinding, and gave in a repreſentation to the Lord Ordinary, praying that the proper officer might be directed to give him up the proceſs to be conſidered, receive his title as donator of eſcheat, and in the mean time ſtop extracting the decree. The Lord Ordinary, on the 25th of July 1726, "Ordained the other parties "concerned to ſee this repreſentation, and all parties to be ready "next day to argue the ſame before him." The cauſe being accordingly argued on the 26th of July the reſpondents inſiſted that the ſubject in queſtion being of the effects of Lord Preſtonhall, the appellant could have no intereſt therein; and they referred to the judicial conſent given two years ago by the appellant's counſel to the decree in favour of Lord Royſtoun: the Lord Ordinary thereupon, of that date, "Refuſed the prayer of the appellant's repreſentation, and allowed the decree to be extracted."

The

The appellant thereupon reclaimed. The Court, after a hearing, on the 29th of July 1726, "adhered to the Lord Ordinary's "interlocutor, and refuſed the deſire of the petition."

The appeal was brought from "ſeveral interlocutory ſentences "or decrees of the Court of Seſſion of the 18th of February "1724, the 20th, 25th, 26th, and 29th of July 1726." Entered, 1 Feb. 1726-7.

[It has not been deemed neceſſary to detail the argument on either ſide upon this caſe: ſuch argument relating almoſt entirely to the circumſtances involving the fact of the truſt, impugned on one ſide, and defended on the other, upon which no correct information is given.]

After hearing counſel, *It is ordered and adjudged, that the ſaid petitition and appeal be diſmiſſed, and that the interlocutors therein complained of be affirmed: and it is further ordered, that the appellant do pay or cauſe to be paid to the reſpondents the ſum of 60l. for their coſts in reſpect of the ſaid appeal.* Judgment, 13 April 1727.

For Appellant, *Dun. Forbes. Will. Hamilton.*
For Reſpondents, *P. Yorke. Ch. Areſkine.*

David M'Culloch, of Pilton, - - *Appellant;* Caſe 137.
Chriſtian M'Culloch, - - - *Reſpondent.*

17th *April* 1727.

Aliment by a mother to her ſon, if granted animo donandi or not.—A father grants bond of proviſion to a younger ſon, in a certain ſum, binding himſelf and his heirs to aliment him till 21, or to pay intereſt on the bond: the mother marries a ſecond huſband, and in her marriage-contract ſtipulates a power of alimenting her ſon, out of her jointure from her firſt huſband: in a proceſs by the aſſignee of the younger ſon, againſt his eldeſt brother, for intereſt, as not being alimented by the father's heirs, ſuch intereſt is decreed, and the mother is found to have alimented the younger ſon *gratis*.

Litigious.—The eldeſt ſon, pending this action, paid his mother's ſecond huſband a ſum for his younger brother's aliment, but it is found that the diſcharge, taken for that ſum, being granted *pendente proceſſu*, did not influence the cauſe.

Bond.—Termly Penalty.—A bond of proviſion by a father contains a clauſe of annual-rent, but no penalty on failure: in an action of damages for not punctual payment of intereſt, and expences thereon incurred, the defence that the bond contained no termly penalty is overruled.

Coſts.—An affirmance with 80*l.* coſts.

JAMES M'CULLOCH of Pilton left iſſue three daughters, Jane, the reſpondent Chriſtian, and Catherine; and two ſons, David the appellant, and Alexander, who were twins. The real eſtate deſcended to David the appellant, as eldeſt ſon; to his other children he granted bonds of proviſion, payable at the firſt terms of Whitſunday, or Martinmas, after Alexander ſhould attain his age of 21 years, or the daughters be married, with intereſt from the terms of payment; and he bound himſelf and his heirs to aliment and educate theſe younger children ſeverally till the intereſt upon

their bonds became payable; and upon failure to maintain, educate, and inſtruct them, he bound himſelf and his heirs to pay them the intereſt of their proviſions, beginning at the firſt term of Whitſunday or Martinmas after ſuch failure. The proviſion to Alexander was 10,000 merks, to the reſpondent Chriſtian 4000 merks, and to Catherine 3000 merks.

James M'Culloch died in February 1703, and after his death the appellant David and his brother Alexander, then minors, were alimented by their mother; they did not attain to 21 years of age till 1714. In 1705 the mother intermarried with Mr. Roſs, her ſecond huſband; and by their marriage-contract it was agreed, that during the lifetime of Lady Lindores, who liferented great part of Mr. M'Culloch's real eſtate, it ſhould be in the power of the mother to apply ſuch part of her jointure from her firſt huſband as ſhe thought fit, not exceeding three chalders of bear or oatmeal yearly, for the maintenance of the appellant and his brother Alexander, whilſt they ſhould remain in family with her. And ſhe at ſame time made over to her ſaid ſecond huſband a debt of 2000 merks, to which ſhe had right as executrix confirmed to her firſt huſband, and which Mr. Roſs agreed ſhould be a fund for the aliment of her two ſons David and Alexander.

Accordingly the appellant and his brother continued in family with their mother till May 1710, when their uncle and tutor at law took charge of them, and ſettled them firſt at ſchool at Inverneſs, and afterwards at Edinburgh.

In May 1715 the reſpondent procured from her brother Alexander an aſſignment of ſo much of the intereſt of his bond of proviſion from his father, due preceding the term of Whitſunday 1715, as ſhould amount to the ſum of 100*l.* And the reſpondent thereupon commenced her action againſt the appellant for that ſum. The appellant ſtated for defence, that Alexander's bond of proviſion entitled him to no annual-rents till his majority, except upon failure of alimenting and educating him; but that Alexander had been conſtantly maintained and educated, as the appellant was, till his majority in Auguſt 1714. After the commencement of this proceſs the appellant accounted with his mother's ſecond huſband for his own and his brother Alexander's aliment, paying a balance in money to Mr. Roſs, and taking a diſcharge for the ſame.

The marriage-articles between Mr. Roſs and the appellant's mother were produced; and the cauſe ſtood over till 1724, but being then revived, the reſpondent inſiſted, that the marriage-articles were a proof that the mother intended to make a preſent of Alexander's aliment to himſelf; and that the aliment having been ſo furniſhed by her *animo donandi*, the payment made by the appellant in 1716 could not be conſtrued as a ſatisfaction for that aliment, eſpecially ſince the account was ſettled after the appellant was put in *mala fide* to make any ſuch tranſaction by the commencement of the action.

After

After ſundry proceedings, and a reclaiming petition and anſwers, the Court, on the 1ſt of January 1725, "Found, that Mr. "Roſs's diſcharge, being granted *pendente proceſſu*, doth not influ- "ence the cauſe, and that Alexander was alimented by the mo- "ther *gratis*; and that the benefit thereof doth accreſce to the "ſaid Alexander, reſerving the further conſideration if the ſaid "benefit ought to be extended further than the value of the "aliment." And to this interlocutor the Court adhered on the 29th of the ſame month of January. The appellant having preſented a petition, praying that extracting the decree might be ſtopped, the Court, after anſwers, on the 20th of February 1725, "refuſed the deſire of his petition."

During the dependence of the ſaid action, the reſpondent had obtained a decree, in 1715, againſt the appellant for payment to her of the intereſt on her own bond of proviſion for 4000 merks, and on her ſiſter Catherine's bond for 3000 merks, to which ſhe had right by aſſignment, until the principal ſums ſhould be paid. She afterwards inſiſted, in a freſh action, to have the appellant decreed to pay the principal ſums to the reſpondent; and alſo to pay a ſum of money, in name of damages and expences, through her not having received punctual payment of her intereſt ſince 1715. The appellant in defence ſtated, that all the intereſt was paid up but for one year; that there was no penalty in the bond for not punctual payment of the intereſt, and that no damages could be demanded, as the debtor had accepted of her intereſt, though perhaps later than the day of its falling due.

The Lord Ordinary diſmiſſed the libel as to the principal ſums, and having reported the remainder of the cauſe to the Court, their lordſhips, on the 19th of February 1724, "Found the appellant "liable in damages and in the expences of proceſs." A condeſcendance having been given in, the Lord Ordinary, on the 3d of July 1724, "modified the damages and expences to 456*l.* 18*s.* 4*d.* "Scots, and decerned." To this interlocutor his lordſhip adhered on the 18th of July 1724, and the appellant having reclaimed, the Court, on the 24th of July, refuſed the deſire of his petition.

The appeal was brought from "ſeveral interlocutory ſentences "of the Lords of Seſſion, made the 19th of February, the 3d, "18th, and 24th days of July 1724, the 1ſt of January, and the "affirmance thereof, and an interlocutor of the 20th of Fe- "bruary 1725." Entered, 12 March 1724-5.

Heads of the Appellant's Argument.

The intereſt, by the expreſs condition of the bond to Alexander, was not to commence till he was 21 years complete; in conſideration whereof he was to be alimented at the appellant's expence; and intereſt was only to become due before his majority, upon failure of alimenting, the next term after ſuch failure, ſo without proof made of a failure in alimenting, the intereſt could not be found due; and the *onus probandi* ought to have lain on the reſpondent.

It appeared in court that the appellant did aliment his brother Alexander, inaſmuch as his mother did furniſh that aliment, partly out of the appellant's effects, and partly out of her own, and had allowance in account, and repayment of what ſhe ſo furniſhed.

His mother's furniſhing aliment to Alexander could not be conſidered as a donation *ex pietate materna*, becauſe Alexander had of his own to aliment him with, viz. the obligation which lay upon the appellant to aliment him.

If the mother's act, in alimenting the appellant and his brother, is to be conſidered as a donation, it muſt be preſumed a gratuity to the appellant, becauſe it helped to fulfil the obligation under which he lay, and appears to have been intended to continue until his eſtate was relieved of the burden of the life-rent of the Lady Lindores.

Bonds in the law of Scotland are conſidered to be *ſtricti juris*, and therefore afford action no further than is expreſsly ſtipulated in them: now in the bonds in queſtion there is a penalty adjected upon the failure of paying the principal ſum, but there is no penalty added upon the failure of paying the intereſt preciſely at a day; and therefore the demand for expence and damages ought not to be allowed.

Though it ſhould be allowed that the reſpondent ought to be reimburſed of any charges really expended in recovering payment, ſhe could have no pretence to damages, of which no account is given, nor proof made; and which, as they are decreed, exceed by much the value of the whole intereſt owing to her at the time of making the demand.

Heads of the Reſpondent's Argument.

This aſſignment was made many years after the ſaid Alexander was alimented, and when he was come of age, (no demand having ever been made on that account), and was obtained *pendente proceſſu*.

As aliment furniſhed by a parent to an infant, without demanding a previous ſettlement for it, or claiming ſatisfaction, even after the ſon was of age, is preſumed to be given, and to proceed *ex pietate parentis*; ſo the gift can never bear a conſtruction in favour of any other than the child ſo alimented, where it is not otherwiſe expreſsly declared. The mother having in her contract of marriage with her ſecond huſband, reſerved a power to apply part of her jointure for the aliment of her ſons, the appellant and Alexander, ſhe thereby plainly ſignified her intention to renounce all demand for the expence of ſuch aliment for the future, till they came of age; which was a convincing argument, that the former aliment was a gift, and could not be retracted by her huſband after the marriage, he having renounced his intereſt therein. By the bond of proviſion the appellant was bound not only to aliment, but likewiſe to educate the ſaid Alexander at ſchool, college, law, or any other ſcience that he ſhould incline to, or pay the intereſt of the money; and there-

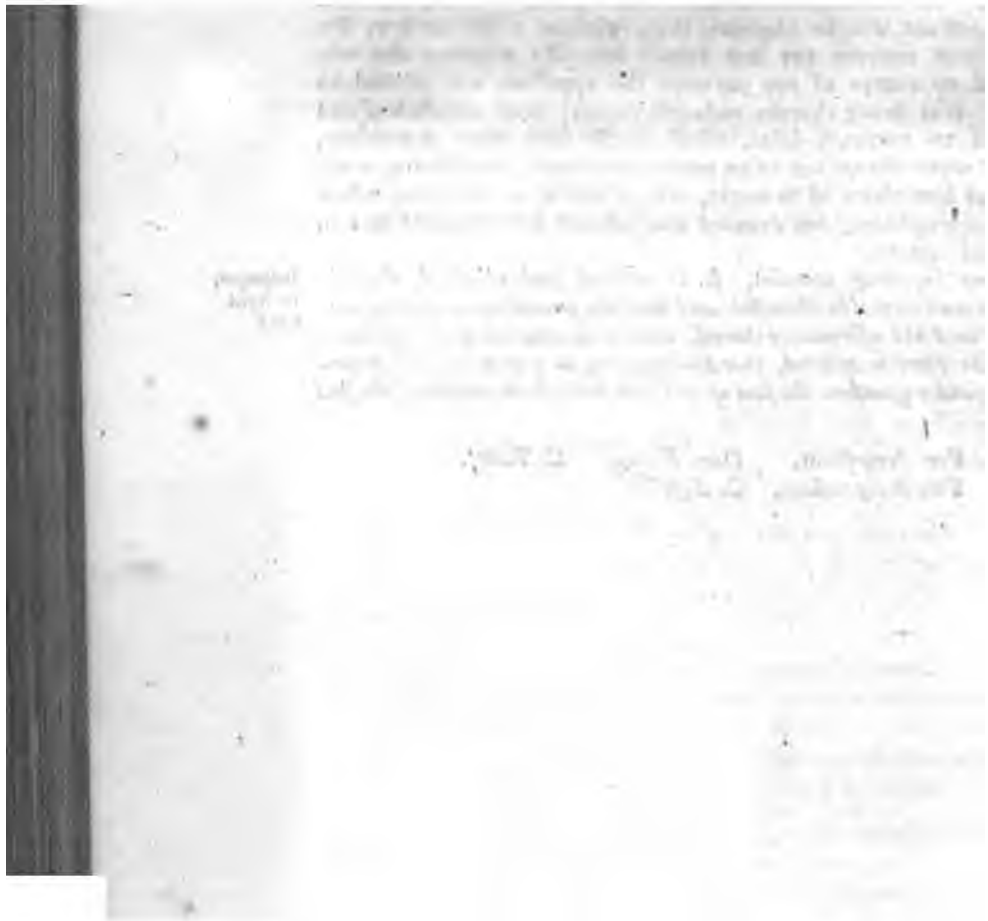
therefore the ſubſiſtence furniſhed by the mother did not fulfil the condition of the bond, the appellant not having at any time been at the leaſt expence toward his education.

The power in the contract of marriage was only to diſpoſe of part of the jointure for maintenance, but not for education of the ſaid Alexander. The giving bread to her own child could be deemed a favour to himſelf only, and the rather for that a condition is added in the ſaid contract, that during the continuance of the maintenance her ſons ſhould remain in the cuſtody and keeping and under the power and direction of their mother.

The appellant had, as heir to his father, a very conſiderable eſtate; and the reſpondent but a poor proviſion. Nevertheleſs the appellant was ſo litigious, that, without a ſuit at law, ſhe could not recover any one term's intereſt; whereby ſhe was obliged to accept of any payment the appellant was pleaſed to offer. But being thereby reduced to very great neceſſities, and obliged to contract debts, whilſt theſe ſuits were depending, which were drawn out to an intolerable length, and having never releaſed her claim of damages, which had been taxed far below her real expences, her demand was juſt and well founded both in law and equity.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the ſeveral interlocutory ſentences, and the affirmances thereof, therein complained of, be affirmed: and it is further ordered, that the appellant do pay or cauſe to be paid to the ſaid reſpondent the ſum of* 80*l. for her coſts in reſpect of the ſaid appeal.* Judgment, 17 April 1727.

For Appellant, *Dun. Forbes. C. Talbot.*
For Reſpondent, *C. Erſkine.*



APPENDIX.

THE twenty-five cases of appeal, at the instance of the Commissioners and Trustees for the forfeited Estates, noticed briefly at the end of the appeal brought by these Commissioners and Trustees v. James Drummond, in which the judgments of the Court of Session were found to be null and void for want of jurisdiction, are as follows; No. 64. P. 297.

1. *The Commissioners and Trustees of the forfeited Estates* v. *Thomas Erskine of Mar*, entered 15th Dec. 1719, decided 15th Feb. 1719-20.

2. *Ditto* v. *John Stirling*, eldest son of James Stirling, late of Keir, entered 18th Dec. 1719, decided 17th Feb. 1719-20.

3. *Ditto* v. *Andrew Cassie* of Kirkhouse, entered 18th Dec. 1719, decided 17th Feb. 1719 20.

4. *Ditto* v. *Wm. Maxwell*, son to William late Earl of Nithsdale, entered 18th Dec. 1719, decided 14th March 1719-20.

5. *Ditto* v. *John Erskine* of Balgownie, entered 18th Dec. 1719, decided 14th March 1719-20.

6. *Ditto* v. *George Earl of Kinnoul* and *George Hay Drummond*, his eldest son, entered 18th Dec. 1719, decided 14th March 1719-20.

7. *Ditto* v. *David Threipland*, eldest son of Sir David Threipland of Fingask, entered 18th Dec. 1719, decided 14th March 1719-20.

8. *Ditto* v. *Sir James Stewart* of Goodtrees, entered 18th Dec. 1719, decided 14th March 1719-20.

9. *Ditto* v. *Arthur Balfour*, eldest son to Colonel John Balfour, and the creditors of the deceased Robert Lord Burleigh, entered 18th Dec. 1719, decided 14th March 1719 20.

10. *Ditto* v. *James Lord Bargany* and his guardians, *Robert Dundas* of Arniston, one of the Senators of the College of Justice, and *John Jolly*, Merchant in Edinburgh, entered 18th Dec. 1719, decided 14th March 1719-29.

11. *Ditto*

11. *Ditto* v. *Hugh Wallace* of Ingleſtoun, entered 18th Dec. 1719, decided 14th March 1719-20.

12. *Ditto* v. *Alexander Baine*, Advocate, entered 18th Dec. 1719, decided 14th March 1719-20.

13. *Ditto* v. *Donald M'Donald* and *John Stewart* of Grantully, entered 18th Dec. decided 14th March 1719-20.

14. *Ditto* v. *Patrick Earl of Marchmont*, entered 18th Dec. 1719, decided 14th March 1719-20.

15. *Ditto* v. *Henry Scrimſeour*, eldeſt ſon of John Scrimſeour, late of Bowhill, entered 18th Dec. 1719, decided 14th March 1719-20.

16. *Ditto* v. *Robert Gordon*, ſon of William late Viſcount of Kenmuire, entered 18th Dec. 1719, decided 14th March 1719-20.

17. *Ditto* v. *Alexander Earl of Home* and *Anne Counteſs Dowager of Home*, entered 18th Dec. 1719, decided 14th March 1719-20.

18. *Ditto* v. *Harie Maule* of Kellie, entered 21ſt Dec. 1719, decided 14th March 1719-20.

19. *Ditto* v. *John Forbes*, Advocate, entered 21ſt Dec. 1719, decided 14th March 1719-20.

20. *Ditto* v. *John Preſton*, only ſon of the late Sir John Preſton, Bart. entered 21ſt Dec. 1719, decided 14th March 1719-20.

21. *Ditto* v. *John Gordon*, ſon of Alexander late Viſcount Kenmuire, entered 21ſt Dec. 1719, decided 14th March 1719-20.

22. *Ditto* v. *Colin Mackenzie*, Advocate, entered 21ſt Dec. 1719, decided 14th March 1719-20.

23. *Ditto* v. *Lady Mary Hamilton* of Baldoon, entered 22d Dec. 1719, decided 14th March 1719-20.

24. *Ditto* v. *Charles Craigengelt*, entered 20th Dec. 1719, decided 26th March 1719-20.

25. *Ditto* v. *William Martin* of Harwood, entered 18th Dec. 1719-20, decided March 1719-20.

The following appeals were alſo decided in the period comprehended in this volume; but are not reported, becauſe the printed caſes were not found in any collection ſearched for that purpoſe.

26. *The Commiſſioners and Truſtees of the forfeited Eſtates* v. *Donald Mackenzie* of Kilcowie: this appeal, (entered 21ſt Dec. 1719), was brought from "an interlocutory ſentence or "decree of the Lords of Seſſion in Scotland of the 3d of "September 1719."

Judgment 13th January 1720-1.—After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutory ſentence or decree therein complained of be affirmed.*

27. *The Commiſſioners and Truſtees of the forfeited Eſtates* v. *John Earl of Ruglen*: this appeal (entered 25th March 1724) was brought from "a decree of the Court of Delegates in "Scotland, made the 6th day of March 1724, praying that "the ſame might be reverſed, and that the judgment and "decree given by the appellants the 17th of October 1720, "might be affirmed."

Judgment 12th Feb. 1724-5.—Counſel for the appellants only attending, they were called in and heard, and withdrew; and due conſideration being had of the merits of this cauſe, *It is ordered and adjudged, that the decree of the Court of Delegates complained of in the appeal be reverſed; and that the judgment and decree of the Commiſſioners and Truſtees of the forfeited Eſtates be affirmed.*

28. *The Commiſſioners and Truſtees of the forfeited Eſtates* v. *George Maclain* Portioner of Preſton: this appeal (entered 26th March 1724) was brought from "a decree of the Court "of Delegates in Scotland, made the 9th day of March "1724, praying that the ſame might be reverſed, and that "the decree and judgment given by the appellants the "17th of Auguſt 1719 might be affirmed."

Judgment, 12th Feb. 1724-5.—After hearing counſel, *It is ordered and adjudged, that the decree of the Court of Delegates complained of in the appeal be reverſed; and that the judgment and decree of the Commiſſioners and Truſtees of the forfeited Eſtates be affirmed.*

29. *Gabriel Napier* Writer in Edinburgh v. *Peter Napier* of Napierſtoun and *Margaret* his wife: this appeal (entered 28th Jan. 1725-6) was brought from "ſeveral interlocutors of "the Lords of Seſſion in Scotland, of the 10th and 20th "of November 1722, the 25th and 28th of June, the 20th "of November, and 13th of December 1723, and an in-"terlocutor of the 11th of July 1724."

Judgment, 12th Feb. 1724-5.—After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutory ſentences therein complained of be affirmed; and it is further ordered, that the appellant do*

do pay or cauſe to be paid to the reſpondents the ſum of 80*l. for their coſts in reſpect of the ſaid appeal.*

During this period 219 appeals from Scotland appear to have been entered, of which number there were

Judgments affirmed	78
——— reverſed or altered	62
——— annulled (as noticed in the Appendix) .	25
Appeals withdrawn or diſmiſſed . . .	50
——— remaining on the roll 15th May 1727 .	4

INDEX

OF THE

PRINCIPAL MATTERS

CONTAINED IN

THIS VOLUME.

ACCESSORIUM ſequitur principale. See *King's annexed Property* No. 55. p. 254.

Act of Parliament 1693, c. 9. The accounts of a magazine keeper, taken and verified in terms of this act, needed not be verified anew before the Court of Seſſion. No. 14. p. 43.

—— 1 G. 1. c. 20. See *Forfeiture for Treaſon*, No. 59. p 274. No. 65. p. 298. No. 71. p. 331. No. 72. p. 335. No. 73. p. 337. No. 79. p. 349.

—— 1 G. 1. c. 20. and 50. A perſon's liferent eſcheat was granted away, for not complying with the act 1 G. 1. c. 20. He was afterwards attainted of treaſon under the act 1 G. 1. c. 50. This laſt act declared that all eſtates of which the forfeiting perſon was in poſſeſſion, prior to a certain period, ſhould be veſted in his majeſty, and that every grant made by his majeſty of any part of ſuch eſtate ſhould be void: the grant of the liferent eſcheat made within this period was valid, notwithſtanding the proviſos of the laſt-mentioned act. No. 53. p. 241.

—— 4 G. 1. c. 8. Conſtruction of a ſpecial proviſo therein, relative to a gift of eſcheat in favour of Simon Lord Lovat. No. 53. p. 241.

—— 5 G. 1. c. 22. This act having limited a certain time for preſenting exceptions to the Court of Seſſion againſt a forfeiture, a perſon who preſented his exceptions in one character could not, after expiration of the time limited, reply in another character, though he held both. No. 57. p. 263. No 61. p. 280.

Adjudication. A charge was given to a ſon to enter heir to his uncle and mother, and adjudication was had thereon; but the father being found to be liar, this firſt adjudication was reduced. No. 27. p. 99.

A ſon refuſing to ſubject himſelf to his father's debts, had no title to impugn an adjudication of his father's fee. *Ibid.*

The court, in a caſe conſidered to be doubtful, having ſuſtained an adjudication for the principal ſum and intereſt, *without all accumulation, penalties, and expences whatſoever*; the adjudication being confirmed upon appeal, the latter part of the judgment of the court was reverſed. No. 48. p. 211.

In

Adjudication.

In an action of mails and duties brought by an adjudger, the defender made various objections to the adjudication as irregular, and overpaid; upon the adjudger finding caution to repeat over-payments, these objections were repelled, leaving to the defender his remedy by declarator. No. 122. p. 531.

Aliment. A father granted a bond of provision to a younger son, in a certain sum, binding himself and his heirs to aliment him till 21, or to pay interest on the bond: the mother married a second husband, and in her marriage contract stipulated for a power of alimenting her said younger son, out of her jointure from her first husband: in an action by the assignee of the said younger son against his eldest brother for interest, as not having been alimented by his father's heirs, such interest was decreed for, and the mother was found to have alimented the younger son *gratis*. No. 137. p. 611.

Annual-rent. Two tradesmen having contracted to clothe a regiment, and to divide equally, under a penalty, the sum to be received by virtue of an assignment of off-reckonings; one got possession of the whole sum, and being decreed by the Court of Session to refund to the other, but without interest, the judgment was reversed, and the respondent ordered to repay with interest from the time of receiving the money. No. 36. p. 147.

Aliments to children were to be imputed to the rents of the years in which they were paid, and not to be deducted out of the annual-rents due by a factor. No. 85. p. 380.

A loan of money agreed to be repaid by a certain day, bore interest after that day, though no interest was stipulated for: exchange and re-exchange, which the borrower agreed to pay, also bore interest from the day of payment. No. 131. p. 582.

In a decree for payment of a certain sum, part was distinguished as principal bearing interest, and part as interest only. *Ibid.*

See *Factor*, No. 85. p. 380.

Appeal. Appellants not appearing on the day appointed for hearing, their appeal was dismissed with costs. No. 5. p. 11.

An appeal competent, though objection made that it involved the sentence of a presbytery. No. 6. p. 12.

An appeal competent from a decree in 1698, and interlocutor in 1708, though objection made, that a decree in 1707, confirming that in 1698, was not appealed from. No. 7. p. 16.

In the case of an appeal brought for delay, the respondent was found entitled to such interest as he might have entitled himself to, by registering the horning, had he not been restrained by the appeal. No. 17. p. 59.

Decrees of the *Court of Justiciary* reversed upon appeal. No. 20. p. 69.

In an action of declarator of trust, decree was given holding the defender as confessed upon an account of charge and discharge given in by the pursuer; and he was ordered to denude. Afterwards, upon the defenders' application, the Court allowed him ten days longer to give in his accounts; but before the expiration of these ten days he brought his appeal against certain interlocutors, and amongst others against the interlocutors holding him as confessed, and ordering him to denude. After the determination in the first appeal, the defender applied to the court to have liberty to give in his accounts in ten days, as allowed by the interlocutor before the appeal; but it was found,

Appeal.
that his right was extinguiſhed, and he was ordered to denude in terms of the decree affirmed by the Houſe of Lords. No. 92. p. 409.

The Court of Seſſion having refuſed to put Mr. Haldane (who had obtained the King's letter of appointment as an ordinary Lord of Seſſion) upon trial for what the Court deemed want of due ſervice, as an advocate, an appeal lay from that determination of the Court. No. 95. p. 422.

Interlocutors reverſed, and an agreement relative thereto adjudged, *of conſent.* No. 107. p. 471. No. 130. p. 577.

A purſuer who had prevailed in a reduction of certain bonds, craved that they might be delivered up to him by the clerk, but the defender having ſtated that he meant to appeal, and the Court having ordered the bonds to remain in proceſs, and not to be delivered up without a freſh warrant, their judgment was affirmed. No. 127. p. 558.

Arbitration. On a day appointed by two arbitrators for determining a matter ſubmitted to them, one of them declined to act, and the overſman thereupon pronounced an award: the Court having reduced this award as incompetent, the judgment was reverſed. No. 87. p. 391.

Art and Part. See *Spuilzie*, No. 95. p. 431.

Aſſignation. See *Foreign Deeds*, No 1. p. 1.

Battery pendente lite. Circumſtances inferring this crime: though decree taken in the civil action, recourſe might alſo be had to the penal. No. 16. p. 55.

Bona fide Conſumption. A ſuperior being in poſſeſſion by a declarator of non-entry, and found not to be obliged to admit an univerſity for his vaſſal, but ſuch proper perſon as they ſhould nominate, was nevertheleſs obliged to account for the rents ſince the charter was offered to him by the univerſity, he having deduction of his caſualties, as if the old vaſſal had then entered. No. 40. p. 172.

An adjudication obtained in 1678, having been found to be extinguiſhed by receipt of rents; in a ſubſequent action of count and reckoning, the Court having found the defence of *bona fides* ſufficient to liberate till the date of the interlocutor, finding the adjudication compenſed, and that the defenders were not put in *mala fide* by the citations and arreſtments, the judgment was reverſed, and they were ordered to account from the date of the arreſtments uſed at commencement of the previous action. No. 91. p. 405.

Bona fide payment. A purchaſer at a judicial ſale having paid a *bona fide* debt to creditors ranked before him; in accounting to creditors who were prior to both, had allowance of ſuch *bona fide* payment, but action of repetition was reſerved to the prior creditors. No. 69. p. 317.

Burgh Royal. The Court of Seſſion having found that the butchers of Edinburgh ſhould be reſtrained from rinding tallow for ſale, and that the magiſtrates could oblige them to ſell their tallow at a certain price to the candlemakers, which was in terms of a bye-law of the magiſtrates, ratified by a private act of parliament, the judgment was reverſed. No. 31. p. 124.

It was a relevant ground to annul an election of magiſtrates, that the provoſt had unwarrantably impriſoned ſome of the electors, during the time of the election, with an intention to prevent their giving their votes at that election. No. 102. p. 452.

Butchers. The act of parliament 1540, c. 123. forbidding butchers to rind or melt tallow, found to be in desuetude. No. 31. p 124.

Cautioner. A person who had, without confirming, intrometted with his father's effects which were left to him by will for payment of debts, was upon application of the creditors ordained to intromet with the effects upon inventorying the same, and finding caution to make the same forth-coming; he accordingly found caution, and upon a subsequent application for summary intromission with some of the effects, the Court refused the same, and ordained him to confirm the testament and prosecute in common form; but he neither inventoried the effects, nor confirmed the testament; the cautioner was liable for the whole goods intrometted with. No. 42. p. 183.

Vide *Solidum et pro rata*, No. 105. p. 465.

Clause. An estate was entailed by a person to himself in liferent, and to his eldest son and the heirs male of his body, whom failing to the entailer himself, whom failing to his second and third sons, &c., whom all failing to the entailer's nearest heirs and assignees: another estate was entailed to the second son of the former entailer, and the heirs male and female of his body, whom failing to the said former entailer, and his heirs male of tailzie and provision in the former entail: after failure of the institute in the second entail, and the heirs male, and female of his body, the heir male of the first entailer succeeded to the estate contained in the second entail. No. 21. p. 76.

The Court of Session having found, that the irritancy of the contravener's right in the entail of Reccarton did only respect the heirs female, and not the heirs male, their judgment was reversed. No. 29. p. 110.

A minister who was also patron of his parish, having been deprived of his benefice by the presbytery, conveyed his right of patronage to a purchaser, reserving his own right as minister, or preacher; the Court having found that the disponee had not the right of presenting during the grantor's lifetime, the judgment was reversed. No. 81. p. 364.

The grantor of a deed obliged himself and his heirs male, and of tailzie, provision, &c. upon failure of heirs male of his own body, and *heirs male of the descendants of his body*, to resign the lands for infeftments to his daughters, and the heirs male of their bodies without division, &c.; in a competition between the heir male of the body of his eldest daughter, and a person claiming as heir male of the descendants of his body, the former was preferred. No. 129. p. 564.

College of Justice. Mr. Haldane, who had been a member of the faculty of advocates for seven years; but who, by being a member of parliament, and a commissioner for the forfeited estates, during great part of that time, did not then attend in the college of justice, was nevertheless qualified to be a Lord of Session. No. 95. p. 422.

Compensation. In a suspension, the suspender's plea of compensation was rejected. No. 54. p. 249.

A bond granted by the Earl of Panmuir was conveyed to an onerous assignee on 21st April 1716; by an act of parliament passed on 7th May 1716, his lordship was attainted of treason from November 1715. The original holder of the bond in January 1717 acknowledged, upon oath, that he had purchased in April or May 1716, from Lady Panmuir, as her husband's attorney, a quantity of grain, and had paid her the price. The trustees for forfeitures found, that the bond was compensated against the assignee, and that an arrestment used

Compenſation.
uſed againſt the debtor on 9th May 1716, and a horning ſigneted on 26th October thereafter, were no ſufficient intimation of the aſſignment; but their judgment was reverſed by the court of delegates, and ſuch reverſal affirmed on appeal. No. 82. p. 368.

Coſts of Appeal and Expences of Proceſs. 5*l.* coſts given to one of ſeveral reſpondents. No. 4. p. 8.

40*l.* given againſt appellants who did not appear on the day appointed for hearing, *though no recognizance had been entered into.* No. 5. p. 11.

Directions given to the Court of Seſſion (on petition) how to levy theſe coſts. *Ibid.*

Expences of the court below given to an *appellant.* No. 8. p. 19.

Proceedings on the mode of aſcertaining the amount of theſe expences. *Ibid.*

40*l.* coſts given againſt an appellant, a minor. No. 10. p. 28.

Expences of the court below given againſt a reſpondent. No. 14. p. 43.

40*l.* coſts given againſt an appellant. No. 16. p. 55.

Ditto ditto. No. 17. p. 59.

30*l.* ditto. No. 33. p. 134.

Two tradeſmen having contracted to clothe a regiment, and to divide equally, under a penalty, the ſums to be received by virtue of an aſſignment of off-reckonings. One got poſſeſſion of the whole, and being ſued by the other, whoſe claim was reſtricted to a ſmaller ſum than demanded, he was decreed by the court to refund, but without expences: on appeal, the judgment was reverſed, and the court was ordered to cauſe the expences of the appellant to be taxed and aſcertained, and forthwith paid by the reſpondent. No. 36. p. 147.

The appellant having complained by petition that the Court of Seſſion had not cauſed his expences to be taxed and aſcertained, and paid to him in terms of the judgment of the Houſe of Lords, proceedings thereon:—a ſum allowed to the complainant for his ſubſequent expences in taxing the expences formerly awarded. *Ibid.*

A perſon having right to the balance of the price of an eſtate, which price was ſtipulated for in an agreement with penalty, obtained decrees in ſeveral actions for principal and intereſt; and in the laſt of theſe actions inſiſted for expences of all the former actions; the court having refuſed to grant theſe expences; on appeal the judgment was reverſed, and the court was ordered to cauſe the expences of all the actions to be taxed and paid to the appellant. No. 37. p. 154.

Subſequent proceedings on two complaints by the appellant, that the court had not taxed ſuch expences: the Houſe, by a committee, taxed the expences of the court below, and coſts of theſe two complaints, and ordained the ſame, amounting in all to 611*l.* 4*s.* 4½*d.* to be paid by the respondent, a minor, and his tutors and curators. *Ibid.*

Expences of the court below, and 30*l.* coſts of appeal given to an *appellant.* No. 40. p. 172.

30*l.* coſts given againſt an appellant. No. 41. p. 178.
40*l.* Ditto No. 42. p. 183.
Ditto ditto No. 47. p. 209.
Ditto ditto No. 52. p. 234.
20*l.* Ditto No. 54. p. 249.

Coſts of Appeal and Expences of Proceſs.
60*l.* coſts given againſt an appellant. No. 55. p 254.
30*l.* Ditto No. 59. p. 259.
60*l.* Ditto No 69. p. 317.
An heir having ſucceeded againſt a perſon, in the place of a judicial factor, in an action of removing and in a count and reckoning, but not to the full extent of his claims, the Court refuſed him his expences: but their judgment was reverſed, and they were ordered to cauſe the expences and damages of the appellants to be taxed and aſcertained according to the regulations, when defenders are litigious, and when ſo aſcertained to be forthwith paid to the appellants. No. 85. p. 380.
Upon complaint to the Houſe of Lords that they had not cauſed theſe expences and damages to be taxed purſuant to ſaid order, the Houſe, by a committee, taxed the expences at 640*l.* which ſum they ordered the reſpondent forthwith to pay. *Ibid.*
In an action relative to the commencement of *mala fides*, the Court having found that the ſame did not commence from the date of citation and arreſtment, but from the date of the decree in a former action, and refuſed the purſuer his expences in both; on a reverſal of the judgment on appeal, it was ordered that the Court ſhould tax and aſcertain the expences in the laſt action, and that the ſame ſhould be then paid to the appellant. No. 91. p. 405.
The appellants having failed to appear on the day appointed for hearing, the reſpondents were heard, and the judgment affirmed with 100*l.* coſts. No. 96 p. 431.
One of the defenders in a ſpuilzie, who was an officer in the king's ſervice during the rebellion, being aſſoilzied, petitioned for his expences, which were refuſed by the Court; but the judgment was reverſed, and the Court was ordered to tax and aſcertain theſe expences. No. 108. p. 477.
20*l.* coſts given againſt an appellant. No. 110. p. 488.
40*l.* coſts given to one of the reſpondents. No. 112. p. 499.
Truſt bonds granted conditionally, if the grantor ſhould procure two commiſſions held by the grantee, in conſequence of reſignations which he then executed, were reduced upon the ground, that though the grantor held the reſignations in his hands, he did not procure the new commiſſions in virtue thereof, but in conſequence of other means and conſiderations; but the Court having refuſed the purſuer his expences, the judgment was reverſed, and the Court was ordered to cause theſe expences to be taxed and aſcertained, and forthwith paid to the purſuer. No. 127. p. 558.
50*l.* coſts given againſt an appellant, executrix of the perſon againſt whom the interlocutors were pronounced. No. 128. p. 561.
50*l.* coſts given againſt an appellant; ſubſequent proceedings relative thereto; and an order made to pay by a day certain, before eſcheating the recognizance. No. 131. p. 582.
5*l.* coſts given againſt an appellant who had deſerted his appeal. No. 132. p. 590.
60*l.* coſts given againſt an appellant. No. 136. p. 607.
80*l.* Ditto No. 137. p. 611.
Courteſy. An heireſs's infeftment, reduced after her death for informality, but not challenged in her lifetime, was ſufficient to ſupport the courteſy. No. 44. p. 192.

Courteſy.

An heireſs being reponed againſt certain deeds executed by her when a minor, with conſent of a major huſband, on the ground of minority and leſion; after her death ſuch conſent excluded the huſband's courteſy. No 78. p. 346.

Creditors of a Defunct.—Act of Sederunt, 1662. After the expiration of ſix months from the death of a debtor, one creditor cited the executor in an action of conſtitution on the 18th of June, and on the ſame day the executor cited that Creditor, and another, to whom the deceaſed had given a general aſſignation of rents, &c. in a multiple poinding; this general aſſignee afterwards, on the 27th of June, cited the executor in an action of conſtitution; the creditor giving the firſt citation alſo got the firſt decree of conſtitution, and was by the Court preferred to the other; but the judgment was reverſed and both were preferred *pari paſſu*. No. 109. p. 483.

Death-bed. The Court having found that death-bed could be pleaded by an heir cut off by two prior deeds, and that it could be pleaded by creditors; their judgment was reverſed. No. 111. p. 493.

Did contracting the ſickneſs, at the time of executing the deed, conſtitute death-bed? *Ibid.*

A minor, with conſent of his curators, could not gratuitouſly, on death-bed, alter the ſettlements of his eſtates. No. 129. p. 564.

Deed ſee *Writ.*

Depoſitum. The depoſitary of a South-Sea ſubſcription was warranted in paying money and accepting ſtock, as the principal muſt have done in terms of an act of parliament. No. 131. p. 582.

Eſcheat. An act of parliament at the time of the rebellion in 1715, having ordained perſons ſummoned by the crown to appear before the Court of Juſticiary, and find caution for their good behaviour under the pain of liferent eſcheat, &c.; and the liferent eſcheat of a perſon failing to appear, having been adjudged and granted to a donatory; though there was no previous declarator, the rents were ordered to be paid to the donatory; but the creditors who were real at the time of the falling of the eſcheat, were ordered to be charged on the eſtate in due courſe of law. No. 53. p. 241.

An eſtate having been ſettled by entail upon a perſon in liferent, and a certain ſeries of heirs in fee, with the burden on the liferenter of an aliment to the firſt ſubſtitute; the liferenter forfeited his liferent eſcheat for treaſon; the Court of Seſſion, in a competition with the donatory of eſcheat, having granted an aliment to the fiar, their judgment was reverſed. No. 101. p. 449.

A father conveyed his eſtate to a truſtee for certain purpoſes; after the father's death, the truſtee ſold part of the eſtates, and bond for the price was taken in the name of the truſter's ſon, who of ſame date granted a back-bond to the truſtee in terms of the father's truſt deed; the ſon was afterwards denounced for treaſon, and his eſcheat granted to a donatory; but he ſubſequently granted an aſſignation to his father's truſtee, which in a competition with the donatory was ſuſtained. No. 135. p. 607.

The donatory having conſented to a decree of preference to children for their proviſions, and having contended that this conſent did not extend to creditors, who were preferred to the children, and petitioned to be heard againſt them, the petition was refuſed. *Ibid.*

Expences, v.de *Coſts of Appeal, and Expences of Proceſs.*

Factor. A perſon who had become ſurety for a judicial factor, and afterwards had a deputation from him, could, by no right acquired during the factory, invert the heir's poſſeſſion; nor could he retain poſſeſſion till his claims were paid, but was to ſue for them as accords. No. 85. p. 380.

He was found liable in terms of the act of ſederunt, 31ſt July 1690, in annual-rent for what he received, or might have received, within one year after the ſame grew due:—He was entitled to no factor-fee, having diſturbed the poſſeſſion of the factor by virtue of other rights and titles in his perſon. *Ibid.*

A foreign factor having adviſed his correſpondents that he had diſpoſed of a cargo, and ſhipped returns for it, on both of which he charged commiſſion; he afterwards brought an action againſt the correſpondents, alleging that he had ſent his own goods, and had not received proceeds for them; but he was not allowed to prove facts contrary to his correſpondence. No. 123. p. 534.

The knowledge of the ſhipmaſter, though ſuper-cargo and part owner, was not relevant againſt this correſpondence. *Ibid.*

Falſa Demonſtratio. Major-General *Thomas* Gordon, Laird of Auchintoule, was attainted by act of parliament; and the commiſſioners of forfeitures ſeized the eſtate of *Alexander* Gordon, whoſe deſcription agreed in every thing with the attainted perſon's, except the chriſtian name; but upon exceptions taken to the Court of Seſſion, the ſeizure was annulled. No. 60. p. 278.

The attainder and forfeiture of *Alexander* Farquharſon did not affect a perſon of the ſame ſurname and deſcription, but bearing the chriſtian name of *Patrick*. No. 74. p. 340.

Fiar. An eſtate being ſettled by an heireſs to her huſband and herſelf in conjunct fee and liferent, and the heirs to be procreated between them in fee, whom failing to the huſband, his neareſt lawful heirs and aſſignees, the huſband was fiar. No. 27. p. 99.

The proprietor of an eſtate burdened with appriſings, dying, left two ſiſters, whoſe huſbands entered into a ſubmiſſion for themſelves, and as taking burden upon them for their wives, with a perſon who had or appeared to have right to theſe appriſings; by the decree arbitral they were decreed to be conveyed to the huſbands and their wives, the huſbands paying the price; the wives were fiars of theſe appriſings. No. 35. p. 144.

A houſe, part of the conqueſt of a firſt marriage, was diſponed to a perſon and his wife in conjunct fee and liferent, and to the *bairns* of the marriage in fee, whom failing to the heirs of the huſband: the huſband being fiar might ſettle the liferent thereof on a ſecond wife. No. 90. p. 399.

See *Forfeiture for Treaſon.* No. 76. p. 342.—No. 77. p. 345.

Fiar abſolute, limited. In a ſon's marriage contract, it was covenanted on the part of the father that lands and hereditaments of a certain annual value were to be ſettled and aſſured, ſo as the ſame ſhould come to and be veſted in the eldeſt ſon of the marriage, and other lands and hereditaments to remain to the ſon's uſe, reſerving the father's liferent of part; the ſon was fiar, and by his bond bound the heirs of the marriage. No. 70. p. 324.

A father granted an abſolute diſpoſition to his ſon, which was not completed by infeftment, or by making up ſchedules in terms thereof; the ſon afterwards joined with the father in making two new ſettlements of the eſtate, and the father, who ſtill continued in poſſeſſion, granted

Fiar absolute, limited.
granted a disposition to a third party after the son's death; the Court having found that these posterior dispositions were not to be of prejudice to the son's creditors, the judgment was reversed. No. 111. p. 493.

A clause of return to the grantor of a deed, after failure of heirs male, did not disable the heir male in possession gratuitously to alter in favour of his daughters. No. 129. p. 564.

Nor did a simple destination to heirs male in several prior deeds hinder this. *Ibid.*

Fiar and Liferenter. The Court of Session having found that a fiar had the right to cut and sell woods growing on part of an estate that was liferented, the judgment was reversed. No. 100. p. 443.

An estate was entailed upon a person in liferent, and a certain series of heirs in fee, with the burden on the liferenter of an aliment to the first substitute; the liferenter having forfeited his liferent escheat for treason, and the Court of Session having, on a competition with the donatory, granted an aliment to the fiar, their judgment was reversed. No. 101. p. 449.

Foreign. A person residing in London brought an action on a promissory note in Scotland, against which usury was pleaded but repelled; the clerk was ordered to retain the note in court, till the pursuer should transfer to his agent in Scotland a collateral security in stock, which had been granted by the defender. No. 115. p. 511.

Foreign decree. A judgment of the Court of King's Bench having been recovered by the administratrix of a copartner in a trading company against the cashier, and being sued on in the Court of Session, this judgment was sustained, the pursuer instructing that his father was a copartner, and that the defender was cashier, and had intromission to make him liable. No. 38. p. 162.

Foreign Deeds. An assignment of a bond (both being executed in England, and in the English form) intimated by letter only, found to be preferable to a posterior arrestment. No. 1. p. 1.

The judgment finding that the law of Scotland should regulate this case, was reversed. *Ibid.*

It was no nullity in a bond that it was executed in England in the Scotch form. No. 112. p. 499.

Forfeited Estates, Commissioners for the. By several acts of parliament, the claims relative to forfeited estates were to be entered before the commissioners by a day certain; in certain cases application was to be made to the Court of Session. A person mistaking his remedy, applied to the Court of Session and obtained a judgment in his favour; but that was afterwards (among others) annulled by the House of Lords, for want of jurisdiction: he then entered a claim before the trustees which they refused to consider, as not having been entered within the time limited; and an appeal to the Court of Delegates was also refused, "leaving the petitioner in his circumstantial case, to make "application for redress to the proper powers." The judgment of the Court of Delegates was affirmed. No. 114. p. 507.

Claims upon the estate of an attainted person, which had reverted to a loyal superior, did not fall under this jurisdiction, but remained to the ordinary courts. No. 122. p. 531.

Forfeiture. An estate being forfeited during the *usurpation*, a *bona fide* creditor of the then government, had been paid his debt by a grant out of the estate; on the restoration of the estate, the heir of such grantee was not obliged to refund. No. 25. p. 91.

Forfeiture for Treaſon. Of a papiſt. No. 57. p. 263.

The act 1 G. 1. c. 20. having given to ſubject ſuperiors the forfeited eſtates of their vaſſals; the Earl of Linlithgow being attainted, forfeited to the Duke of Hamilton a mill, held of his grace as ſuperior; but the earl having thirled part of his eſtate held of the crown to this mill, this thirlage was not forfeited to the Duke of Hamilton. No. 59. p. 274.

The attainted vaſſals of a truſtee for a papiſt, who was alſo attainted, did not forfeit their eſtates to the proteſtant heir, who claimed them as remaining loyal under 1 G. 1. c. 20. but to the crown. No 61. p. 280.

A diſpoſition was made by a father in 1713, to a ſon then a few months old, of his eſtate, reſerving power to ſell or incumber part for debts already contracted, &c. with concurrence of truſtees, and reſerving the grantor's liferent; in 1714 the father renounced this liferent. By his attainder for treaſon in 1715, the eſtate was not forfeited, being veſted in the ſon. No. 64. p. 290.

A father executed an entail in favour of his ſon; the ſon being infeft baſe, was attainted for treaſon; the procuratory of reſignation to the crown not having been executed, the Court under an act of parliament declaring that the eſtates of *vaſſals* attainted were to go to ſuperiors continuing *loyal*, adjudged the eſtate to the father; but their judgment was reverſed upon appeal No. 65. p. 298

An act of parliament, paſſed on the 7th of May 1716, enacted, that the perſons therein mentioned ſhould, under pain of attainder, ſurrender themſelves to a juſtice of the peace, by a day certain. A perſon who had ſurrendered by letter to the commander in chief, before the paſſing of the act, and was directed to proceed to a place appointed, but who, it was alleged, was prevented by indiſpoſition, and who never ſurrendered to a juſtice in terms of the act, was nevertheleſs held to be attainted for treaſon. No. 67. p. 307.

The act 1 G. 1. c. 20 gave to vaſſals continuing loyal a right to hold their lands, &c. of the crown, in the ſame manner as they were held by the ſuperior forfeited for treaſon; but vaſſals in church lands, who had not claimed the benefit of the acts 1633 and 1661, annexing the ſuperiorities of church lands to the crown, and had paid their feu duties to a ſubject ſuperior without receiving any new inveſtiture from him, were not on the ſuperior's attainder entitled to the benefit of the ſaid act 1 G. 1. c. 20. but found to hold of the crown, on payment of the ſame feu-duties, &c. as paid to the forfeiting perſon. No. 71. p. 331.

The act 1 G. 1. c. 20. having enacted that the lands of thoſe guilty of high treaſon, which were held of ſubject ſuperiors, ſhould recognoſce and return into the hands of the ſubject ſuperior who continued loyal; John Grant, an attainted perſon, held his lands of Alexander Mackenzie as his immediate ſuperior: this Alexander was alſo attainted, and *he* held of Lord Royſtoun as his ſuperior, Lord Royſtoun holding of the crown: on Grant's attainder, his property did not go to Lord Royſtoun, but to the crown. No. 72. p. 335.

The act 1 G. 1. c. 20. gave to ſuperiors continuing dutiful and loyal, the eſtates of attainted vaſſals; to a ſuperior claiming the eſtate of his vaſſal, it was objected, that he had correſponded with the Pretender, entertained him at his houſe, and given him a preſent of plate: the Court of Seſſion, on the 29th of October, two days before their powers as to exceptions on the forfeited eſtates expired, granted the objection

Forfeiture for Treaſon.
objectors a proof; and no proof having been adduced, on the 31ſt, circumduced the term againſt them, and decerned in favour of the claimant. No. 73. p. 337.

A truſt eſtate was forfeited by the treaſon of the perſon for whom the truſt was created, though a diſpoſition of the eſtate had been granted by the truſtee, to which the truſter was not a party. No. 75. p. 341.

A crown vaſſal in 1707 ſold and diſponed his eſtate to an onerous purchaſer, with procuratory of reſignation, and other uſual clauſes, and the price was paid; the crown vaſſal in 1715 was attainted for treaſon, and the purchaſer, who had not previouſly completed his title by infeftment, made reſignation, and took infeftment on a charter from the crown: the eſtate was not forfeited by the attainder of the ſeller. No. 76. p. 342. No. 77. p. 345.

The acts relative to forfeiture for treaſon having ſaved the rights of creditors innocent, dutiful, and loyal, a claim on a forfeited eſtate by virtue of a perſonal bond, (which had been given up in the inventory by the claimant, when confirmed executor to his father) was made by a perſon who had been confined in priſon on ſuſpicion of treaſon, but liberated without trial; this claim was rejected by the commiſſioners of inquiry and Court of Delegates, but their judgment was reverſed. No. 79. p. 349.

See *Compenſation*, No. 82. p. 368.

Forum competens. The Marchioneſs of Annandale reſiding in England, having been appointed by her huſband executrix for behoof of her children, proved his will in that country: various perſonal creditors of the late Marquis having arreſted in the tenants' hands a jointure payable to the executrix out of the Scots eſtate, and the Court having ordered her to purge the arreſtments before ſhe drew her jointure, the judgment was reverſed, and it was ordered that the arreſtments ſhould be looſed without caution or conſignation. No. 106. p. 467.

Fraud, and Circumvention. In a reduction of ſundry deeds upon this ground, various circumſtances found irrelevant or not proved. No. 13. p. 41.

Circumſtances ſufficient to reduce deeds upon this ground. No. 15. p. 47.

Being ſo reduced, they ſtand as a ſecurity only for the onerous cauſe thereof. *Ibid.*

A creditor purſuing a judicial ſale, entered into a contract, before the ſale, to ſell to a third party at a certain ſum; he afterwards at the ſale purchaſed for a ſmaller ſum, but was obliged to account for the larger ſum, which had been paid to him in terms of the prior contract. No. 69. p. 317.

Funeral Expences. In a queſtion between the heir, and the aſſignee of the executrix of a Lord Juſtice Clerk, 250*l.* being modified as ſufficient for funeral expences, the judgment was reverſed. No. 11. p. 32.

See *Preſcription*, No 18. p. 61.

General Aſſignation. A general aſſignation of a man's perſonal eſtate, made in favour of one who had, without the huſband's knowledge, during the marriage, granted a bond to the wife, blank in the creditor's name, did not releaſe this bond. No. 58. p. 269.

An aſſignation by a debtor to a creditor of as much of the firſt and readieſt of the rents of his lands that ſhould happen to be due to him

General Aſſignation.
at the time of his deceaſe, as would ſatisfy and pay a certain ſum, gave no preference in a competition of creditors after the debtor's death. No. 109. p. 483.

Hæreditas jacens. See *Preſcription*, No. 129. p. 564.

Heritable and moveable. A father in 1641, on his eldeſt ſon's marriage, ſettled an eſtate upon him and the heirs thereof, reſerving a power to burden; the ſon was infeft, and half the marriage portion paid to the father; but the wife dying without iſſue within year and day, the father granted bond to the ſon to employ the ſame for his benefit, or to reſtrict his power of burdening *pro tanto*. The eldeſt ſon alſo dying, the father ſettled the eſtate on the ſecond ſon, who granted heritable ſecurities to creditors, upon which infeftments were taken in 1666, and appriſings in 1670. His ſon having taken up the ſucceſſion as heir to his uncle, at the inſtance of creditors the contract of marriage and infeftment were reduced, but with a clauſe that the half of the marriage portion which had been paid ſhould be a *real* burden on the eſtate. In a competition between the perſon having right to this half of the marriage portion, and the perſon entitled to the infeftments of 1666, and appriſings of 1670, the Court having preferred the former, the judgment was reverſed. No. 39. p. 167.

A bond taken to a man and his wife in liferent, and to their daughter in fee, and failing her by deceaſe, to the huſband, his heirs, executors, or aſſignees, found to be moveable, that being but one ſubſtitution. No. 49. p. 216.

Holograph. Whether holograph or not being referred to the oath of the grantor of a bond, the term was circumduced againſt him for not deponing. No 47. p. 209.

Homologation. In a reduction of a tack on the ground of nullity, it was found by the Court that the receipt of rent by the grantor's heir for more than 30 years imported no homologation; but the judgment was reverſed. No. 12. p. 37.

A perſon againſt whom a judgment had been recovered in England was ſurrendered by his bail, who were releaſed; he thereupon executed an inſtrument purporting that the judgment by ſuch diſcharge ſhould not be releaſed. This inſtrument did not homologate the judgment. No. 38 p. 162.

A perſon diſponed his eſtate to his ſon burdened with payment of his debts; the ſon ſold to an onerous purchaſer, who being ſued by the aſſignee of two bonds granted by the father, objected nullity to theſe bonds. It was alleged that the grantor of the bonds had homologated the ſame by payment of intereſt, &c.; the Court found that ſuch alleged homologation did not hinder the defender from queſtioning theſe bonds. No. 83. p. 372.

A payment to account by the grantor of a bond, after an irritancy thereof incurred, was found in an action againſt the cautioner for the grantor, to be no homologation or paſſing from the reſolutive clauſe. No. 132. p. 590

Huſband and Wife. During the ſubſiſtence of a marriage a wife and her ſiſter having equal right to a bond, conveyed the ſame to the huſband. He afterwards made his will, appointing his wife executrix, and univerſal legatee, for behoof of the grandchildren. After the death of the huſband, the grant formerly made by her to him was not revocable, as a *donatio inter virum et uxorem*. No. 41. p. 178.

A bond

Husband and Wife.

A bond with a clause of annual-rent was granted blank in the creditor's name, and delivered to a wife during the subsistence of her marriage; the husband entailed his real estate on the grantor of the bond, and also conveyed to him all his personal estate, but was not privy to said bond: in a competition between the executor of the husband and the executor of the wife, the husband's executor was preferred to said bond, and the wife's executor was ordered to refund what had been paid to her in her widowhood. No. 58. p. 269.

A liferent granted to a wife by her son was not restricted by a missive letter, executed by her without her husband's consent, though a decree of declarator in absence had been obtained thereon. No. 64, p. 290.

A minor wife, whose husband was major, was reponed on the head of minority and lesion against certain deeds executed by her with her husband's consent; but such consent of the major husband excluded his *jus mariti* and *courtesy*; though it did not extend to enforce a warrandice of the deeds executed by the wife, to which warrandice he was specially bound. No. 78. p. 346.

A person, in his contract of marriage with his first wife, obliged himself to settle his estate on the heirs of the marriage; by a procuratory of resignation executed in same terms, he reserved power to grant provisions to a second wife and younger children, on which infeftment followed; and by a second deed he afterwards restricted his right of granting provision to a second wife and children to the extent of 100,000*l.* Scots: after a second marriage he granted bond to a second wife for an annuity or jointure of 1000*l.* sterling, but made no provision for children of the second marriage. In a question with the heir of the first marriage the second wife was declared to have right to her jointure till she drew thereout the sum of 100,000*l.* Scots. No. 93. p. 411.

See *Legitim*, No. 133. p. 594.

Implied Discharge. A father in his son's marriage contract bound himself to settle an estate upon him of a certain annual value; afterwards the son executed a deed, declaring that the estate was not of such annual value, and granted bond to his father to pay, or allow his father to charge, a sum on the estate for provisions to his younger brothers and sisters; the father afterwards granted a disposition to his son in terms of the marriage-contract; but this was not a discharge of the bond granted by the son. No. 70. p. 324.

Indemnity. Alleged malversations of the conservator at Campvere held to be remitted by an indemnity. No. 8. p. 19.

Battery *pendente lite* not remitted by this. No. 16. p. 55.

Inhibition. By marriage-contract, the husband was bound to resign his estate to himself and the heirs male of the marriage, and inhibition having been used thereon, he was disabled to dispose of that estate gratuitously in prejudice of the heir male of the marriage. No. 15. p. 47.

Irritancy. A collector of taxes during Cromwell's usurpation, entered into an agreement with a person who, after the Restoration, had a commission to sue, compound, transact, and agree on the part of the crown; to this commissioner the collector granted bonds for certain sums, and the commissioner obliged himself to deliver to the collector *by a day certain*, a release from the crown, otherwise the parties were to remain as they were before the bonds were granted; this was no penal irritancy,

Irritancy.
irritancy and was not to be purged, after elapſing of that day. No. 132 p. 590.

Juriſdiction. The York Buildings Company, which had purchaſed large eſtates in Scotland, was liable to be ſued in that country, in a perſonal action relative to a transfer of ſtock, though ſuch transfer could only be made in London. No. 120. p. 521.

——— *Commiſſary Court.* This court could not give decrees of preference among competing creditors. No. 85. p. 380.

See *Forum competens*, No. 106. p. 467.

Jus Exigendi. A lady's jointure being ſecured on certain heritable debts, but no infeftment taken, the huſband's eſtate was afterwards forfeited during the *Uſurpation*; but being afterwards reſtored to his heir, reſerving the claims of the widow and others, and ordering thoſe to refund, who had received grants out of the eſtate; the aſſignee of the widow's executrix had no *jus exigendi* of the ſums received under theſe grants. No. 25. p. 91.

Juſticiary, Court of. Decrees of that court appealed from, and reverſed, together with a judgment of the court of ſeſſion founded thereon. No. 20. p. 69.

King's annexed Property. A perſon to whom part of the annexed property had been granted, created a heritable ſecurity thereon; his own grant was afterwards reduced, and the decree was confirmed by an act of re-annexation; an act of diſ-annexation was ſubſequently paſſed, and a new grant of part of the premiſes made to the repreſentative of the family of the original grantee, though not his heir: this did not revive the heritable ſecurity granted by him. No. 55. p. 254.

Kirk Government. Proceedings againſt an epiſcopal miniſter, before the Toleration Act, 10 Ann. c. 7. who had been impriſoned for exerciſing his function, reverſed on appeal. No. 6. p. 12.

Kirk—Intruſion into. The magiſtrates of Elgin being *pannelled* and convicted in the Court of Juſticiary of an intruſion into the pariſh church, and a fine impoſed upon them, the judgment was reverſed. No. 20. p. 69.

See *Juſticiary, Court of. Ibid.*

Kirk Patrimony. The ſuperiority of certain church lands, which were purchaſed from the crown for an onerous conſideration, and which were ſpecially excepted in the act 1633, c 13. "anent regalities of erection," part of the general re-annexing acts, found to be in ſuch purchaſers, the vaſſal having taken charters and infeftments from the ſubject ſuperior for near 100 years. No. 30. p. 118.

In 1631, certain vaſſals in church lands advanced money to the crown, to aſſiſt in redeeming a wadſet granted to the Earl of Loudon, the Lord of Erection, upon condition that they ſhould hold of the crown as ſuperior, and have certain other privileges; in 1633, the ſuperiorities of all church lands were gratuitouſly annexed to the crown; and about the ſame time vaſſals who ſhould advance money for redeeming their feu duties were allowed by his majeſty to treat with the treaſury for that purpoſe, and to retain their feu duties in proportion to the ſums advanced. In a queſtion between the wadſetter, and the vaſſals, who had advanced money in 1631, it was found that they were not to retain their feu duties, though they had paid money for privileges, the greater part of which had been granted to other vaſſals gratuitouſly. No. 66. p. 303.

See *Forfeiture for Treaſon*, No. 71. p. 331.

Legitim. Portions to children in a contract of marriage, if not ſo expreſſed, did not exclude their legitim. No. 133. p. 594.

Upon

Legitim.

Upon a wife's renouncing her thirds, by the contract of marriage, the diviſion of the perſonal eſtate was bipartite, one half legitim, the other half dead's part. No. 133. p. 594.

Proviſions to children, in this caſe, did not come off the whole head of the executry as a debt; but the legitim was firſt to be imputed in payment of their portions; the reſt was to be taken as a debt from the dead's part, if neceſſary. *Ibid.*

Bonds fall under legitim. *Ibid.*

Lis Alibi pendens. A defence of *lis alibi pendens* was repelled, where the purſuer produced an order diſmiſſing his Chancery ſuit, which was the ſubject of this defence, and a declaration under his hand, diſclaiming all further proceedings in that ſuit. No. 131. p. 582.

Litigious. The aſſignee of a younger brother ſued an elder brother bound to aliment the younger, for intereſt on his bond of proviſion; the mother having alimented the younger ſon *ex pietate*, a ſum paid by the eldeſt ſon to the mother's ſecond huſband, and diſcharge taken for the younger brother's aliment *pendente lite*, did not influence the cauſe. No. 137. p. 611.

Member of Parliament. In an action to reduce the election of certain magiſtrates of a royal burgh, on account of the impriſonment of certain of the electors by the provoſt, who was a member of parliament; the provoſt's privilege of parliament could not be pleaded to ſtop the declarator againſt the other defenders, as not elected by a ſufficient quorum. No. 102. p. 452.

Neither could the provoſt's privilege of parliament ſtop the purſuer from inſiſting upon the reaſon of reduction, that ſome of the electors were unwarrantably impriſoned by the provoſt. *Ibid.*

Minor. A tack, which in the recital bore to be granted by a minor, with conſent of curators, but was ſigned by the landlord only, having been followed by long poſſeſſion, was ſuſtained. No. 12. p. 37.

A minor, though with conſent of his curators, could not gratuitouſly alter the ſettlements of his eſtate. No. 129. p. 564.

See *Huſband and Wife*, and *Courteſy*, No. 78. p. 346.

Minor non tenetur placitare. The maxim did not bar, in a reduction upon the head of *dole* in the minor's father. No. 10. p. 28.

Miſnomer. See *Falſa Demonſtratio*, No. 60. p. 278. No. 74. p. 340.

Mutual Contract. A creditor by adjudication with an unexpired legal, and without infeftment, entered into an agreement with two other creditors, by which he conſented that they ſhould be paid before him; in a competition between a ſingular ſucceſſor of this adjudger, with notice, and the repreſentatives of thoſe two creditors, it was found that the preference in the contract was perpetual, and that as it concerned a perſonal ſubject, on which no infeftment had followed, it was effectual againſt the ſingular ſucceſſors of the grantors. No. 69 p. 317.

At compromiſing a tranſaction relative to South-ſea ſtock, one of the parties granted an obligation to the other to pay him a certain ſum with this proviſo, that whereas the obligee intended to ſue two of the directors to make void his own bargain, if he ſucceeded, the obligor was to be free of his obligation. The obligee having got an abatement by compromiſe from the directors, the obligor was entitled to a proportional abatement. No. 113. p. 503.

Mutual obligation. A husband having granted a bond of provision in consideration of a disposition executed by his wife, and she having cancelled the disposition, this cancelling dissolved the obligations of the bond. No. 128. p 561.

Negotiorum Gestor. The respondent having sent money by the appellant to be by a third person laid out in stock in the respondent's own name; on the death of this third person, the appellant could not warrantably lay out the respondent's money, in his, the appellant's, own name. No. 99. p. 438.

Non-entry. A superior having obtained a general declarator of non-entry against his vassal, his agent, in a subsequent ranking, restricted the superior's interest so as to be ranked posterior to the creditors annual-renters: on a reduction by the superior, on the head of lesion, and absence *reipublicæ causa*, the ranking was sustained. No. 22. p. 80.

Pactum Illicitum. An estate was settled by a father upon his son and his heirs, reserving a liferent to a certain amount, and by the son's marriage-contract the estate was by covenant to be of a certain annual value: two years after the marriage the son declared by a deed that the estate was not worth so much *per annum*, but that this was done to please his wife's friends; and he granted bond to pay, or allow his father to charge a sum upon the estate, for provisions to his younger brothers and sisters, which should be in full of legitim: this was not *contra fidem tabularum nuptialium*. No. 70. p. 324.

Papist. An estate held in the name of a trustee for the Earl of Seaforth, a papist, was forfeited to the public by the earl's attainder for treason, and could not be taken up by the protestant heir. No. 57. p. 263.

The act of parliament, 1 G. 1. c. 20. gave to loyal superiors the estates of their vassals attainted of treason; six vassals of a trustee for the Earl of Seaforth, a papist, were attainted. and the Earl himself having been also attainted, these estates were claimed by the protestant heir, to whom they were decreed by the Court of Session, but their judgment was reversed. No. 61. p. 280.

A child, a few months old, though born of popish parents, might take an estate by disposition from his father. No. 64. p. 290.

An estate descended to two heirs portioners; the eldest, a papist, by her first marriage had a son a protestant; in a contract on her second marriage she covenanted to settle the estate on her husband and the heirs male of that marriage. After her second husband's death, the eldest son of that marriage granted a disposition of the estate to a third party, no titles had hitherto been made up by this son of the second marriage, nor by his mother; but the disponee now gave them a charge to enter heirs, and thereupon got adjudication. It was not *jus tertii* to the protestant heir of the first marriage to object against this disposition. No. 125. p. 547.

Papists, on whom the succession to heritable subjects devolved before the act 1700, were nevertheless precluded from serving heirs after that act passed, without taking the *formula*. *Ibid.*

An onerous purchaser from a papist could not be in a better situation than the papist himself. *Ibid.*

A person *popishly* educated, and who never took the formula, held to be a papist. *Ibid.*

An objection that a question was not moved of the disponer's puberty, and that he never took the formula, during his life, was repelled. *Ibid.*

The

Popiſt.
The act of parliament 3 G. 1. c. 18. did not extend to papiſts in Scotland. *Ibid.*

Parent and Child. See *Tutor and Pupil.* No. 68. p. 312.

Paſſive Title. A perſon granted an entail of his eſtate to his ſon, and his heirs male whatſoever, with the burden of his debts. The ſon granted a back bond in conſideration thereof to pay the father's debts: after the death of the father and ſon, the daughters conveyed the eſtate real and perſonal of their father and brother, to a creditor, without making up any title thereto; and the creditor granted bond to protect them from what they had done, and the debts of their father and brother; the heir male of entail having got back the eſtate, ſued the ſaid creditor for debts of the father, as a vitious intrometter, in which he obtained decree; and the Court alſo found the moveable debts due to ſuch intrometter to be extinguiſhed; but their judgment was reverſed, and the creditor ordered to account for actual intromiſſions only. No. 124. p. 539.

——— *Apparent Heir.* One paſſing by an apparent heir three years in poſſeſſion, was not liable to implement ſuch apparent heir's gratuitous bond of tailzie. No. 129. p. 564.

Peer. An alleged truſt referred to the oath of a peer. No. 63. p. 287.

Penalty. A bond of proviſion by a father contained a clauſe of annual-rent, but no penalty on failure: in an action of damages for not punctual payment of intereſt, and expences thereon incurred, the defence that the bond contained no termly penalty was over-ruled, and the defender was found liable in damages and expences. No. 137. p. 611.

Perſonal and Real. A diſpoſition was made of an eſtate to one perſon in life-rent, and to others in fee, with the burden of payment of the grantor's debts which were not ſpecified; in a competition between the grantee of the liferent eſcheat of the liferenter, and the creditors of the grantor of the diſpoſition, the Court found that theſe debts were *real*, and did affect the eſtate; but their judgment was reverſed. No. 80. p. 355.

A grantor of a deed declared, that if children's portions were not paid in his lifetime, perſons whom he named might appoint a factor after his death to receive certain rents, and pay ſuch portions; theſe portions were real debts affecting the eſtate. *Ibid.*

A diſpoſition was granted by a father to his ſon of the paternal eſtate, burdened with all debts contracted, or to be contracted by the father; in a queſtion between an onerous purchaſer of the eſtate from the ſon, and an aſſignee of two perſonal bonds granted by the ſaid diſponer, the Court found that theſe debts were a *real* burden upon the ſubject diſponed; but their judgment was reverſed. No. 83. p. 372.

See *Mutual Contract.* No. 69 p. 317.

Perſonal and Tranſmiſſible. A ſum appointed by a father to be paid to his ſon, his heirs, executors or aſſignees, at a day certain, was tranſmiſſible by the ſon, though he died before that day. No. 70. p. 324.

Preſcription. Furniſhings to a funeral did not form ſuch a continuation of accounts as to bar the triennial preſcription of accounts incurred before the death of the deceaſed. No 11. p. 3[illegible].

The accounts of funeral expences paid by the aſſignee of an executrix without the three years, were preſcribed where the aſſignee was not contractor, but where ſhe was contractor did not preſcribe. No. 18. p. 61.

Preſcription.

An aſſignation of a bond being challenged, the long preſcription was pleaded; but it was found that the preſcription of 40 years was not to be counted from the date of ſuch aſſignation, but from the time of receiving the money thereon. No 41. p. 178.

A baſe infeftment was taken by a ſon on diſpoſitions from his father in 1653 and 1656; in 1680 the father, after the ſon's death, reſigned the lands by a procuratory of reſignation, and took new charters from the crown under which the lands were held, till 1715, without making up titles under the ſon's baſe infeftment; an objection of preſcription to this baſe infeftment was repelled; and it was found that the lands being ſtill in *hæreditate jacente* of the ſon, a title to them could only be made up by a ſervice to him. No. 129. p. 564.

An irritancy in a bond was not cut off by the lapſe of 40 years, after an alleged homologation. No. 132. p. 590.

Preſumption. A bond, on preſumptions, held to be extinguiſhed. No. 23. p. 84.

From circumſtances of preſumption, a perſon appointed factor by the father was made to count and reckon for property, which, with the factor's conſent, had been conveyed by a weak elder brother to another perſon. No. 28. p. 105.

A perſon being ſued in 1715 by the widow of one to whom, in 1697, he had granted a bond of penſion, for the conſideration of managing the grantor's law affairs; though the penſion was never demanded by the grantee during his life, the bond was ſuſtained and the money decerned for. No. 47. p. 209.

In 1691 a colonel gave his lieutenant-colonel a draft on his agent for 250*l.* and paid him 50*l.* in money, for which a receipt was granted; in a ſtatement of all the officers' accounts in 1692, no notice was taken of the tranſaction of the preceding year, but the lieutenant colonel acknowledged to have received 75*l.* 12*s.* 8*d.* of what was due to him, and he and the other officers aſſigned their claims to the colonel, to be ſolicited by him: in an action after the death of the parties in 1719, it was found that the draft for 250*l.* was not to be held to have been paid by the drawee, unleſs this was otherwiſe inſtructed; and that the 50*l.* paid by the colonel in 1691, was not to be held included in the 75*l.* 12*s.* 8*d.* acknowledged, in 1692, to have been received. No. 62. p. 282.

Children's proviſions not claimed till after a forfeiture, and the lapſe of ſeveral years after a locality might have been made effectual to pay them, were not preſumed to have been paid. No. 80. p. 355.

A locality granted as a proviſion to an eldeſt ſon was held to be revoked by a deed of revocation found in the grantor's repoſitories after his death, though not publiſhed or recorded. No. 94. p. 417.

Bonds of penſion granted to an advocate, (afterwards preſident of the Court of Seſſion) during his continuance to be an advocate, were ſued on after his death by his ſon as wholly remaining due, after the lapſe of a good many years from their dates; and were ſuſtained to the date of the grantee's becoming preſident of the Court of Seſſion, his ſon, the purſuer, giving his oath of credulity on the debts reclaimed. Nos. 116, 117, 118. p. 514.

In a reduction of a mother's ſettlements, brought by her ſon as heir againſt a ſiſter who was benefited by them on the ground that the ſiſter had had acceſs to the repoſitories of the deceaſed, and took what deeds ſhe choſe, and might have deſtroyed the reſt; the ſiſter having ſtate

Presumption.
ſtated in defence that the deeds were given to her by her mother, it was neceſſary for the purſuer to prove that the defender's intromiſſion was unwarrantable. No. 126. p. 552.

The deeds produced were preſumed to contain the laſt will of the deceaſed. *Ibid.*

A circumſtantial proof brought by the purſuer, that the deceaſed had declared that ſhe had made other ſettlements, and of embezzlement on the part of the defender was found inſufficient. *Ibid.*

In a proving of the tenor, in regard the purſuer's counſel did not deny that the deed was in her hands cancelled, and refuſed to give their oaths of calumny thereon, the defender was aſſoilzied. No. 128. p. 561.

See *Proviſions to Heirs and Children.* No. 94. p. 417.
Tenor. No. 128. p. 561.

—— *Donatio non præſumitur.* A diſpoſition by a father to his ſon, followed by a ſaſine which was not regiſtered, made to preſerve the eſtate from the penalties of a teſt act, might be warrantably cancelled. No. 2. p. 4.

By marriage-contract a wife was provided to the houſehold furniture; the huſband afterwards granted her a bond, and the liferent of a houſe was ſettled upon her; theſe did not fall under the maxim, but ſubſiſted as ſeparate and diſtinct rights. No. 18. p. 61.

Where a diſpoſition had been made by a father to his ſon, followed with infeftment taken, but not recorded, nor cloathed with poſſeſſion, a daughter was intitled to take up the fee as heir to her father. No. 27. p. 99.

Marriage proviſions preſumed to be compenſated by the grant and acceptance of a poſterior proviſion. No. 80. p. 355.

Two deeds of mortification for educating children at a pariſh ſchool were found in the grantor's repoſitories after his death; the one bore date four years after the other, but was in ſame terms with the firſt, with this alteration only, that a larger ſum was mortified, and a greater number of boys to be educated: the Court having found that both ſubſiſted as diſtinct deeds, the judgment was reverſed. No. 84. p. 377.

The Court having alſo refuſed a proof by the inſtrumentary witneſſes of the donor's intention, their judgment was reverſed, and liberty given to examine the inſtrumentary witneſſes. *Ibid.*

Deciſions preciſely ſimilar given by the Court below, and Court of Appeal, in the caſe of two other deeds of mortification granted by the ſame party to King's College, Aberdeen. No. 89. p. 397.

Prize. A French privateer having captured a Scotch ſhip, took a quantity of goods out of her, and ſome money from the ſhipmaſter, and upon payment of a ranſom agreed upon, allowed the ſhip to depart with a ranſom brief; the privateer having continued upon the coaſt, and being there captured by a Britiſh ſhip of war, the goods and money taken by force, as well as the ranſom money, were to be reſtored by the captors. No. 32. p. 130.

Proceſs. In a competition between two perſons ſeverally claiming to be heirs to an eſtate, the inqueſt refuſed to retour either of them. One of theſe parties called the other as a defender in an action of reduction and declarator; a third claimant then craved to be admitted as a defender in that action, ſtating himſelf to be in the ſame degree of propinquity with the other defender, which the purſuer acknowledged.

Proceſs.
ledged. The Court having refuſed to admit this third party as a defender in that action, the judgment was reverſed. No. 98. p. 456.

In the reduction of a bond, bearing to be for money lent, on the ground of no onerous cauſe, the defender acknowledged that the conſideration was the future transfer of South-Sea ſtock, and ſtated that ſuch transfer was afterwards made accordingly to the purſuer's order. This quality in the condeſcendance did not prove againſt the purſuer. No. 112. p. 499.

In a proceſs relative to the advance of a ſum of money, the purſuer ſet forth the tenor of an obligation granted by himſelf to the defender's father, for a *depoſitum* made by the latter, and ſeveral letters as in the defender's hands; in terms of the act of ſederunt, the defender was held as confeſſed on the tenor libelled, as he neither confeſſed nor denied the ſame. No. 131. p. 582.

See *Uſury*. No. 115. p. 511.

—— *Act and Commiſſion.* A purſuer oppoſed the granting of an act and commiſſion for examining the defender, a peer, in London, in a matter referred to his oath, on the ground that he being old and poor could not follow the examination; the commiſſion was nevertheleſs granted. No. 88. p. 394.

—— *Decree.* In a decree an alleged former decree having been founded on, as the ground thereof, and ſuch decree not having been pronounced, the ſecond decree was null. No. 85. p. 380.

—— *Expences of.* See *Coſts of Appeal and Expences of Proceſs.*

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—— *Lis finita.* After extracting a decree, with a reſervation therein of ſeveral claims, the objection of *lis finita*, and that theſe points were not contained in the original ſummons, was ſuſtained by the Court; but their judgment was reverſed upon appeal, and it was found that the aſſignee of an executrix *might inſiſt* for theſe claims. No. 11. p. 32.

Notwithſtanding this reverſal, it was found in a new action, that it was ſtill competent to plead preſcription to theſe claims. No. 18. p. 61.

Promiſſory note. It was objected to a promiſſory note granted in London, that it was not holograph nor ſigned before witneſſes, and that therefore the ſigning and payment of the money ought to be proved; but the objections were repelled No. 115. p. 511.

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A deed found to be fraudulently altered, upon ocular inſpection of its different pieces, and a letter from one of the perpetrators of the fraud. No. 10. p. 29.

A debt held to be ſubſtantiated againſt a cautioner by the oath of the perſon for whom he was bound, in another cauſe. No. 42. p. 183.

Whether

Proof.

Whether holograph, or not being referred to the oath of the grantor of a bond, the term circumduced againſt him for not deponing. No. 47. p. 209.

The court having allowed a party to report a proof led in the ſame matter at iſſue, but in another cauſe, at the inſtance of another party againſt him, in which his preſent opponents *did compear*, the judgment was reverſed. No. 67. p. 307.

A perſon ſent money to London by another, to be by a third laid out in ſtock in the name of the perſon ſending the money; this third perſon having died, the perſon ſending the money received a letter from his ſon, informing him that the bearer of the money had laid out the ſame in ſtock in his own name, and gave the other his option to ſtand to the bargain or not; this letter was held to be proof of ſuch option tendered. No. 99. p. 438.

In a reduction on the head of uſury, the court having refuſed to examine a menial ſervant of the defender, who was a ſubſcribing witneſs to the agreement alleged to be uſurious, the judgment was reverſed of conſent. No. 107. p. 471.

The grantee in a bond having propoſed to examine a cautioner therein as a witneſs with regard to the tranſaction for which the bond was granted, conſenting that what he deponed to ſhould not be of prejudice to him; the court refuſed to admit him, but the judgment was reverſed of conſent. *Ibid.*

In a ſpuilzie brought againſt the leader of a party on the king's ſide during the rebellion, perſons belonging to that party were valid witneſſes for the defender. No. 108. p. 477.

A foreign factor ſuing merchants in Scotland, alleging that his claim was known to and approved of by the ſhipmaſter, having refuſed to refer this to the ſhipmaſter's oath, a proof by witneſſes was refuſed him. No. 123. p. 534.

See *Preſumption*, No. 126. p. 552.

Proviſions to Heirs and Children. A mother being put in poſſeſſion of her eldeſt ſon's forfeited eſtate for aliment to younger children; in a queſtion with the ſon after reſtoration of the eſtate, it was found that the mother's intromiſſions above the current intereſt of the children's portions, went in diſcharge of former intereſt and current intereſt, but not in payment of principal, or of future intereſt. No. 16. p. 55.

A portion being left to a daughter, with a proviſo that ſhe ſhould not diſpoſe of or encumber the ſame, or intereſt thereof, till the times of payment were elapſed; ſhe might nevertheleſs aſſign the ſame in truſt, to have an action carried on to recover the intereſt. No. 17. p. 59.

A ſpecial proviſion in a marriage-contract of ſums of money to be laid out on land, or other good ſecurity, and alſo of conqueſt in lands, heritages, fiſhings, ſums of money and others, to the *heirs* of the marriage, went to all the children, and not to the eldeſt ſon only. No. 90. p. 399.

A diſcharge of proviſions granted by two of theſe children to their father, in conſideration of a certain ſum of money paid to them, operated in his favour with regard to the remainder of their proviſions, and not in favour of another child who did not diſcharge. *Ibid.*

A father executed a deed in favour of his heir, giving him a locality over part of his eſtate, and aſſigning the tacks to him with warrandice from fact and deed, and a power of revocation *by writ under the*

Proceſs.
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A debt held to be ſubſtantiated againſt a cautioner by the oath of the perſon for whom he was bound, in another cauſe. No. 42. p. 183.

Whether

Ranking and Sale.
for ſix years, during which term the perſon in poſſeſſion of it accounted for the rents which were leſs than the intereſt of the price. 4th, A deduction of certain expences he had been put to, in adjuſting the debts due by the eſtate. In this caſe the purchaſer had been employed as agent to conduct the ſale. The court having refuſed theſe deductions, and allowed the ſellers 30*l.* of expences. The judgment was affirmed. No. 34. p. 139.

Recognition. See *Forfeiture for Treaſon*, No. 72. p. 335.—No. 73. p. 337.

Reduction. In an action where various objections were made to the purſuer's title, the court having ordered production to be made, and afterwards granted certification; the judgment was reverſed, and it was ordered, that the defenders ſhould not take a term for production, until the purſuer had made out his title, upon which he founded his ſuit. No. 104. p. 459.

The defenders in a reduction improbation having objected to the purſuer's infeftment, which was taken at the caſtle of Banff by diſpenſation in a charter of 1625, that by a poſterior charter the caſtle was disjoined from the barony; the court found that objection not relevant to hinder the taking of terms for production, reſerving this matter after production; but their judgment was reverſed. No. 121. p. 525.

The defenders made another objection, that the purſuer claimed under a charter to heirs male, whereas a ſubſequent charter, as they offered to prove, had been granted to heirs general: the court gave the ſame judgment on this, as on the former objection; but their judgment was alſo reverſed. *Ibid.*

And it was ordered, that in the further progreſs of the cauſe, the court ſhould not oblige the appellants to take a term for production, until the purſuer made out his title, on which he founded his ſuit. *Ibid.*

Regiſtration. A deed reſtricting an unlimited power of granting proviſions to a ſecond wife and younger children, which unlimited power was contained in infeftments upon record, was found valid, though not regiſtered, in a queſtion between the heir and a ſecond wife. No. 93. p. 411.

Repreſentation. The heir male of a marriage, to whom an eſtate was provided by marriage-contract, being ſerved *hæres maſculus et proviſionis*, was found by the court liable to warrant his father's deeds; but the judgment was reverſed. No. 15. p. 47.

A diſpoſition was made by a perſon to one of his daughters, and the heirs of her body, whom failing to —— his heirs and aſſignees; upon this diſpoſition the daughter was infeft, and dying without iſſue, her ſiſter was ſerved *tanquam legitima et propinquior hæres* to the father and her; the ſervice ought to have been as heir of proviſion. No. 44. p. 192.

The eldeſt ſon of a marriage was retoured *legitimus et propinquior hæres* to his father *cum beneficio inventarii*. In the inventory he gave up not only the lands ſettled upon him in his mother's contract of marriage, but alſo certain other lands, and afterwards brought a reduction of the proviſions in a ſecond contract of marriage, alleging that he was ſerved heir of proviſion, the narrative of the retour deſigning him heir procreated between a certain father and mother: it was found

General Aſſignation.
at the time of his deceaſe, as would ſatisfy and pay a certain ſum, gave no preference in a competition of creditors after the debtor's death. No. 109. p. 483.

Hæreditas jacens. See *Preſcription*, No. 129. p. 564.

Heritable and moveable. A father in 1641, on his eldeſt ſon's marriage, ſettled an eſtate upon him and the heirs thereof, reſerving a power to burden; the ſon was infeft, and half the marriage portion paid to the father; but the wife dying without iſſue within year and day, the father granted bond to the ſon to employ the ſame for his benefit, or to reſtrict his power of burdening *pro tanto*. The eldeſt ſon alſo dying, the father ſettled the eſtate on the ſecond ſon, who granted heritable ſecurities to creditors, upon which infeftments were taken in 1666, and appriſings in 1670. His ſon having taken up the ſucceſſion as heir to his uncle, at the inſtance of creditors the contract of marriage and infeftment were reduced, but with a clauſe that the half of the marriage portion which had been paid ſhould be a *real* burden on the eſtate. In a competition between the perſon having right to this half of the marriage portion, and the perſon entitled to the infeftments of 1666, and appriſings of 1670, the Court having preferred the former, the judgment was reverſed. No. 39. p. 167.

A bond taken to a man and his wife in liferent, and to their daughter in fee, and failing her by deceaſe, to the huſband, his heirs, executors, or aſſignees, found to be moveable, that being but one ſubſtitution. No. 49. p. 216.

Holograph. Whether holograph or not being referred to the oath of the grantor of a bond, the term was circumduced againſt him for not deponing. No 47. p. 209.

Homologation. In a reduction of a tack on the ground of nullity, it was found by the Court that the receipt of rent by the grantor's heir for more than 30 years imported no homologation; but the judgment was reverſed. No. 12. p. 37.

A perſon againſt whom a judgment had been recovered in England was ſurrendered by his bail, who were releaſed; he thereupon executed an inſtrument purporting that the judgment by ſuch diſcharge ſhould not be releaſed. This inſtrument did not homologate the judgment. No. 38 p. 162.

A perſon diſponed his eſtate to his ſon burdened with payment of his debts; the ſon ſold to an onerous purchaſer, who being ſued by the aſſignee of two bonds granted by the father, objected nullity to theſe bonds. It was alleged that the grantor of the bonds had homologated the ſame by payment of intereſt, &c.; the Court found that ſuch alleged homologation did not hinder the defender from queſtioning theſe bonds. No. 83. p. 372.

A payment to account by the grantor of a bond, after an irritancy thereof incurred, was found in an action againſt the cautioner for the grantor, to be no homologation or paſſing from the reſolutive clauſe. No. 132. p. 590

Huſband and Wife. During the ſubſiſtence of a marriage a wife and her ſiſter having equal right to a bond, conveyed the ſame to the huſband. He afterwards made his will, appointing his wife executrix, and univerſal legatee, for behoof of the grandchildren. After the death of the huſband, the grant formerly made by her to him was not revocable, as a *donatio inter virum et uxorem*. No. 41. p. 178.

A bond

Husband and Wife.

A bond with a clause of annual-rent was granted blank in the creditor's name, and delivered to a wife during the subsistence of her marriage; the husband entailed his real estate on the grantor of the bond, and also conveyed to him all his personal estate, but was not privy to said bond: in a competition between the executor of the husband and the executor of the wife, the husband's executor was preferred to said bond, and the wife's executor was ordered to refund what had been paid to her in her widowhood. No. 58. p. 269.

A liferent granted to a wife by her son was not restricted by a missive letter, executed by her without her husband's consent, though a decree of declarator in absence had been obtained thereon. No. 64, p. 290.

A minor wife, whose husband was major, was reponed on the head of minority and lesion against certain deeds executed by her with her husband's consent; but such consent of the major husband excluded his *jus mariti* and *courtesy*; though it did not extend to enforce a warrandice of the deeds executed by the wife, to which warrandice he was specially bound. No. 78. p. 346.

A person, in his contract of marriage with his first wife, obliged himself to settle his estate on the heirs of the marriage; by a procuratory of resignation executed in same terms, he reserved power to grant provisions to a second wife and younger children, on which infeftment followed; and by a second deed he afterwards restricted his right of granting provision to a second wife and children to the extent of 100,000*l.* Scots: after a second marriage he granted bond to a second wife for an annuity or jointure of 1000*l.* sterling, but made no provision for children of the second marriage. In a question with the heir of the first marriage the second wife was declared to have right to her jointure till she drew thereout the sum of 100,000*l.* Scots. No. 93. p. 411.

See *Legitim*, No. 133. p. 594.

Implied Discharge. A father in his son's marriage contract bound himself to settle an estate upon him of a certain annual value; afterwards the son executed a deed, declaring that the estate was not of such annual value, and granted bond to his father to pay, or allow his father to charge, a sum on the estate for provisions to his younger brothers and sisters; the father afterwards granted a disposition to his son in terms of the marriage-contract; but this was not a discharge of the bond granted by the son. No. 70. p. 324.

Indemnity. Alleged malversations of the conservator at Campvere held to be remitted by an indemnity. No. 8. p. 19.

Battery *pendente lite* not remitted by this. No. 16. p. 55.

Inhibition. By marriage-contract, the husband was bound to resign his estate to himself and the heirs male of the marriage, and inhibition having been used thereon, he was disabled to dispose of that estate gratuitously in prejudice of the heir male of the marriage. No. 15. p. 47.

Irritancy. A collector of taxes during Cromwell's usurpation, entered into an agreement with a person who, after the Restoration, had a commission to sue, compound, transact, and agree on the part of the crown; to this commissioner the collector granted bonds for certain sums, and the commissioner obliged himself to deliver to the collector *by a day certain*, a release from the crown, otherwise the parties were to remain as they were before the bonds were granted; this was no penal irritancy,

Tailzie. An heir of entail prohibited from alienating gratuitously, where the prohibitory, irritant, and reſolutive clauſes were referred to as contained in another entail. No. 21. p 76.

At making an entail the inſtitute re-conveyed to his father an eſtate formerly ſettled upon him, and he and his wife diſcharged an obligation upon the father contained in their contract of marriage, the inſtitute nevertheleſs could not gratuitouſly alter. *Ibid.*

It being found, that in reſpect an entail with prohibitory clauſes contained no irritancy of the right of the contravener, the debts of the heir in poſſeſſion did equally affect the eſtate with the debts of his authors; the judgment was reverſed. No. 29. p. 110.

An entail executed prior to the act 1685 ſuſtained, though objection made that it was not regiſtered in terms of that act. *Ibid.*

A father infeft in an eſtate in life-rent, and a ſon enfeft in fee, jointly entailed the eſtate in the ſon's contract of marriage, with prohibitory, irritant, and reſolutive clauſes, and with power to the father and ſon jointly to alter; the entail was inſert in the regiſter of tailzies upon the joint ſupplication of the father and ſon, but no reſignation was made, nor infeftment taken thereon: the irritancies and clauſe not to alter were binding upon the ſon after the father's death, even ſuppoſing the ſubſtitution were gratuitous. No. 46. p. 203.

A ſon received right to an eſtate from his father, and the ſon afterwards executed a procuratory of reſignation for an entail of the eſtate, with prohibitory, irritant, and reſolutive clauſes to himſelf in life-rent and to his father in fee, and failing of him to the heirs male to be procreated of his own body, and failing of them to other heirs of entail: this procuratory was recorded in the regiſter of tailzies, and inhibition uſed againſt the grantor, but no charter or ſaſine taken thereon: it was found that there being no antecedent onerous cauſe for making this entail eſpecially in favour of heirs to be begotten and born, and ſeeing it remained in the terms of a perſonal right, without being perfected by charter or ſaſine, it was revocable by the maker thereof with conſent of his father the firſt inſtitute. No. 51. p. 226.

A father executed an entail in favour of his ſon; the ſon incurred an irritancy in favour of the father for not relieving him from debts within a certain period; but before declarator was attainted of treaſon: the court found that the eſtate returned to the father, though there was no declarator of the irritancy, and that the irritancy was not purgeable. Upon appeal the judgment was found *null, the court having no juriſdiction.* No. 65. p. 298.

A tailzie executed in 1716, not recorded in the regiſter of tailzies, ſuſtained in 1725, as a title whereon to ſerve heir of proviſion. No. 129. p. 564.

Teinds. Prorogations of tacks of teinds, where an augmentation of ſtipend was ſmall, reduced from ſix 19 years, to one 19 years. No. 7 p. 16.

Grounds ſufficient on which to reduce a decree of erection of a new pariſh. No. 19 p. 65.

The reaſons of reduction ought to have been adviſed before ordering a new proof and perambulation. *Ibid.*

An action of valuation being ſuffered to fall aſleep, the miniſter let a tack of certain teinds to the magiſtrates of a royal burgh, and the action being wakened, theſe magiſtrates ought to have been called as parties. No. 26. p. 96.

A decree

Teinds.
A decree of valuation, obtained on a miſtake as to the rental, ſet aſide, and the miſtake rectified. No. 26. p. 96.

Tenor. The tenor of a loſt deed of remuneration to a wife over certain lands, for part of her jointure ſecured upon other lands renounced by her, found to be proved, by an inſtrument of ſaſine, a deed in which the remuneratory deed was recited, and a ſlender proof by witneſſes. No. 43. p. 187.

It was not neceſſary to prove the *caſus omiſſionis* in this caſe. *Ibid.*

The defender having claimed a proof that the purſuer, his mother, in his minority had intromiſſion with all his father's writings, the ſame was refuſed. *Ibid.*

The court having reduced a decree of proving the tenor of a bond in 1698, and a decree of adjudication on the bond prior, and decree of mails and duties ſubſequent to the proving of the tenor, for the reaſon that it had not been proved who were the writer and witneſſes; their judgment was reverſed, and the reaſons of reduction repelled. No. 48. p. 211.

In an action by a mother againſt her ſon for proving the tenor of a deed executed by her in her huſband's lifetime, the purſuer having the diſpoſition in her own hands cancelled, and having never ratified the ſame judicially, it was preſumed to have been cancelled by herſelf, and ſhe was not allowed to prove the tenor thereof. No. 128. p. 561.

Teſtament. A teſtament executed *in extremis* reduced, where the teſtator's hand was ſupported, and aſſiſted, in writing the latter part of his name. No. 9. p. 26.

Thirlage. See *Forfeiture for Treaſon*, No. 59. p. 274.

Treaſon. Obligations granted by a perſon in priſon before trial. The Earl of Winton, while in priſon, previous to his trial and attainder for high treaſon, granted receipts bearing to be for money advanced to him, but theſe were not allowed in whole. No. 119. p. 518.

It was found, however, that he was entitled to be alimented out of his eſtate at that period, and to apply money to the expences of his trial and for his maintenance in priſon for 3 months; and for ſuch expences the ſum of 2972*l.* 3*s.* was modified. *Ibid.*

See *Forfeiture for Treaſon paſſim.*

Treaſury and Exchequer. Appeal from a judgment of the commiſſioners of. No. 3. p. 8.

Truſt. A ſecond ſon having accepted from his father a tack of the family eſtate for payment of debts, and having afterwards obtained from his elder brother a diſpoſition of that eſtate; in an action at the inſtance of the ſon of this elder brother, (whom the court had found to have been ſerved *heir male*) the truſtee was obliged to count and clear the onerous cauſe of ſaid diſpoſition. No. 15. p. 47.

A diſcharge granted by an executrix to a manager for her under a will, who had a ſalary, of all his receipts and intromiſſions, was not ſufficient to diſcharge him from the intromiſſion with a bond, which the deceaſed had diſponed to his widow and executrix, for the good of his grandchildren. No. 41. p. 178.

Though the aſſignation of the bond bore to be for an onerous cauſe, in the circumſtances of the parties, as executrix and truſtee, it was held in a queſtion near 50 years from the date of this aſſignation, that it did not prove the onerous cauſe thereof. *Ibid.*

Truſt.
Circumſtances inferring the truſt of a diſpoſition bearing to be heritable and irredeemable, and upon which infeftment had followed. No. 52. p. 234.
The truſt being declared, the truſtee was ordered to continue in poſſeſſion till it was redeemed, or proved that the debt was paid. *Ibid.*
After ſeveral interlocutors holding the appellant as confeſſed for not deponing, the appeal was brought that he might be reponed to his oath; but the interlocutors were affirmed. *Ibid.*
An eſtate held in truſt for a papiſt was forfeited by his attainder for treaſon, and could not be taken up by the proteſtant heir. No. 57. p. 263.
The attainted vaſſals of the truſtee of an attainted papiſt did not forfeit their eſtates to the proteſtant heir, who claimed them as a loyal ſuperior under 1 G. 1. c. 20. but to the crown. No. 61. p 280.
A perſon who had conveyed his feu to his ſuperior's ſon, having contended that the conveyance was depoſited with a truſtee, till certain conditions were fulfilled; after obtaining the oath of the ſuperior, was alſo allowed the oath of his ſon, the diſponee. No. 63. p. 287.
In a ſubſequent appeal on the ſame ſubject, the ſon having deponed that he perſonally gave no conſideration for the deed, and that it was not delivered to him, but that every thing was tranſacted by his father, and that he never heard of any conditions or truſt; it was found that the depoſitions did not ſupport the allegations of truſt. No. 88. p. 394.
Certain alleged qualifications of truſt found to be irrelevant. No. 97. p. 435.
Truſtees choſen by creditors, who had a ſalary for their trouble, having thrown the debtor into priſon on a caption, but afterwards liberated him without applying to the creditors for their conſent; the debt being afterwards loſt, it was relevant to make theſe truſtees liable to the debt, that they conſented to the debtor's liberation. No. 103. p. 457.
The creditors of a truſtee could not affect the truſt eſtate. No. 136. p. 607.
Tutor and Pupil. Acceptance of the office of tutory found not proved by tutorial inventories, which were not judicially ſigned, and wanted writer's name and witneſſes, unleſs poſterior acts of adminiſtration were proved: nor by a miſſive letter not holograph, conſenting to lend the pupil's money. No. 33. p. 134.
Certain acts of adminiſtration found not ſufficient to infer the acceptance of the office. *Ibid.*
A tutor having taken a heritable bond, in corroboration of a perſonal one, payable to the pupil and her iſſue, whom failing to three aunts, her next in kin, *nominatim*, it was found that he acted warrantably. No. 49. p 216.
Lord Saltoun having left 4000*l.*, payable at the firſt term after his deceaſe to the eldeſt ſon of the maſter of Saltoun, and failing him to the grantor's heirs of entail; and having appointed an uncle of the pupil to be his tutor and curator, with a ſalary during non-age, with power to upliſt the principal and intereſt, to employ the money in the purchaſe

Tutor and Pupil.
purchaſe of lands, &c.; the pupil's father, the heir and executor of the grantor of the proviſion, was not obliged to pay over the money to the uncle without ſecurity: but to pay it to the Court of Seſſion, who were ordered to lay it out in the manner directed by the grant. No. 68. p. 312.

Vis et Metus. During the dependance of a declarator of truſt, the truſtee having arreſted the purſuer, and while under caption having taken from him a diſcharge and renunciation of all truſt, and of the action of reduction; this diſcharge was reduced upon the head of *vis et metus*; and the defender was ordered to pay 60*l.* Scots of expences, before he could be further heard in the principal cauſe. No. 52. p. 234.

A diſpoſition was granted by a woman to her heir at law, reſerving her own life-rent and the courteſy of a future huſband, and declaring that it ſhould not affect the heirs of her own body; and was followed by a more formal diſpoſition a few days afterwards, on which infeftment followed: ſhe brought an action for reduction on the ground that being under arreſt in London, at the ſuit of a creditor, her heir the diſponee had refuſed to bail her, unleſs ſhe executed the deed firſt mentioned; and that the bailiff threatening to carry her to Newgate, ſhe gave her conſent, and executed this deed after bail was granted, but before ſhe left the bailiff's houſe: the court reduced the deed, and all that followed thereon; but their judgment was reverſed. No. 86. p. 387.

Union. See *Reduction*, No. 121. p. 525.

Uſury. During the rapid riſe of South-Sea ſtock an agreement was entered into on a Sunday, to ſell a certain quantity of ſtock, at 90 *per cent.* above the price of the preceding day, the price not to be payable till a year after transfer of the ſtock; and an heritable bond was afterwards granted in conſequence of the transfer for payment of the agreed price on a day certain: this bond being reduced on the head of uſury, the judgment was reverſed of conſent. No. 107. p. 471.

A defender having alleged uſury againſt a promiſſory note granted to the purſuer, the purſuer, a goldſmith or banker, reſiding in London, was ordered to confeſs or deny the facts, and a commiſſion was granted to Lord Chief Juſtice King to take extracts from his books. No. 115. p. 511.

In a loan of money negotiated by drawing on a foreign merchant, and re-drawing on London, the borrower agreed to pay exchange and re-exchange; though this amounted to more than legal intereſt, it was not uſury. No. 131. p. 582.

Writ. An objection made to a receipt, that it was void, being neither holograph, nor having the ſolemnities required by the acts of parliament relative to the teſting of writings, was not ſuſtained. No. 62. p. 282.

Was a deed written and executed at Dublin, which bore to be written "by Edward Dudgeon, Gentleman," valid? *Ibid.*

A deletion, and a marginal note ſigned by the grantor, neither of which were noticed in the teſting clauſe, having been held to be null, the judgment was reverſed. No. 81. p. 364.

The writer of a bond was thus deſigned, "Patrick Gordon, "ſervant to Mr. Alexander Dunbar;" the Court of Seſſion found this

Writ.
this a nullity. This was brought before the Court of Appeal, but was not decided, the appeal being decided upon a ground ſuperſeding that queſtion between the parties. No. 83. p. 372.

A bond reduced as vitiated, where after the ſum, the word "pounds" was written upon an erazure, and the penalty was in merks *effeering* to a fifth part of the principal, if it had been merks, but not if pounds, as it ſtood in the bond claimed on. This bond had been allowed, as it ſtood, for a compenſation in an action between the father of the perſons claiming on it and a third party, upwards of 30 years before, but was not then produced. No. 110. p. 488.

An objection of razure in *ſubſtantialibus* repelled. No. 124. p. 539.

INDEX

OF THE

APPELLANTS' AND RESPONDENTS' NAMES

IN

THIS VOLUME.

Appellants.	Reſpondents.	Num.	Page
ABERCROMBY and others	Innes and Donaldſon	103	457
Allardyce	Smart	90	399
Annandale, Marchioneſs Dowager of,	Annandale, Marquis of,	93	411
Do. and her Sons	Do.	94	417
Do.	Do. and others	106	467
Arratt	Wilſon	52	234
Do.	Do.	92	409
Ayton	Colvill or Ayton (Dame Margaret)	50	221
Baſkett and others	Watſon	45	197
Bayne	Forfeited Eſtates, Commiſſioners of,	114	507
Blackwood	Hamilton	48	211
Blantyre (Lord) and Seaton, George	Currie	24	88
Brand (Sir Alex.)	Mackenzie	3	8
Do.	Kennedy (Sir Thomas) and others	4	8
Bruce	Cuming (Sir Alexander)	115	511
Breadalbane (E. of) and others	Caithneſs (Earl of)	104	459
Brown and Roſs	Morton (Earl of)	55	254
Campbell	Pollock	70	324
Charteris	Hyndford (Earl of)	107	471
Clydeſdale (Marquis of)	Dundonald (Earl of)	129	564
Cochrane	Blantyre (Lord)	127	558
Cockburn	Hamilton	11	32
Do.	Do.	18	61
Collier	Stewart and others	32	130
Crawfurd	Crawfurd	10	28
Cuming (Sir Alex.)	Aberdeen Preſbytery, and Abercromby	81	364

Appellants.	Respondents.	Num.	Page
Cuming (Sir Alex.)	Ferguſon	130	577
Do.	Pantoun	131	582
Cuninghame	Hamilton	43	187
Don	Don (Sir Alexander)	21	76
Douglas's	Montgomerie and others	27	99
Duff	Gordon	83	372
Duff and others	Buchan (Earl of)	121	525
Dunbar	Erſkine	14	43
Durham	Lundine and others	7	16
Edinburgh, Butchers of,	Edinburgh, Magiſtrates and Candlemakers of,	31	124
Elgin, Magiſtrates of,	Elgin, Miniſters of, and others	20	69
Fairholm	Cockburn (Sir William) and Hamilton (Sir George)	69	317
Falconer and others	Muſhett and others	29	110
Falconer	Falconer (Dame Elizabeth) and others	84	377
Do.	Aberdeen, King's College, and Magiſtrates of,	89	397
Farquhar	Loudoun (Earl of),	66	303
Forbes	Forbes	13	41
Forfeited Eſtates, Commiſſioners of,	Mackenzie	57	263
Do. do.	Hamilton (Duke of)	59	274
Do. do.	Gordon	60	278
Do. do.	Mackenzie	61	280
Do. do.	Drummond	64	290
Do. do.	Grierſon	65	298
Do. do.	Macdonald (Sir James)	67	307
Do. do.	Ogilvies	71	331
Do. do.	Mackenzie (Sir James)	72	335
Do. do.	Stewart (Sir George)	73	337
Do. do.	Do.	76	342
Do. do.	Do.	77	345
Do. do.	Farquharſon	74	340
Do. do.	Hog	75	341
Do. do.	Erſkine	82	362
Do. do.	Lockhart 116, 117,	118	514
Do. do.	Stevenſon	119	518
Do. do.	Erſkine App.	1	617
Do. do.	Stirling do.	2	—
Do. do.	Caſſie do.	3	—
Do. do.	Maxwell do.	4	—
Do. do.	Erſkine do.	5	—
Do. do.	Kinnoul (Earl of) and Drummond do.	6	—
Do. do.	Threipland do.	7	—
Do. do.	Stewart (Sir James) do.	8	—
Do. do.	Balfour do.	9	—
Do. do.	Bargany (Lord) do.	10	—
Do. do.	Wallace do.	11	618
Do. do.	Baine do.	12	—
Do. do.	M'Donald and Stewart do.	13	—

Forfeited

Appellants.	Respondents.		Num.	Page
Forfeited Eſtates, Commiſſioners of,	Marchmont (Earl of)	App.	14	618
Do. do.	Scrimſeour	do.	15	—
Do. do.	Gordon	do.	16	—
Do. do.	Home (Earl and Counteſs Dowager of)	do.	17	—
Do do.	Maule	do.	18	—
Do. do.	Forbes	do.	19	—
Do. do.	Preſton	do.	20	—
Do. do.	Gordon	do.	21	—
Do. do.	Mackenzie	do.	22	—
Do. do.	Hamilton (Lady Mary)	do.	23	—
Do. do.	Craigingelt	do.	24	—
Do. do.	Martin	do.	25	—
Do. do.	Mackenzie	do.	26	619
Do. do.	Ruglen (Earl of)	do.	27	—
Do. do.	Maclain	do.	28	—
Fraſer (Sir Peter)	Sandilands		47	209
Goddard	Swinton (Sir John)		38	162
Gordon (Sir Robert)	Brodie		56	259
Gregory	Anderſon		41	178
Gray (Dame Eſther)	Callander		109	483
Gray (Sir James)	Hamilton (Duke of) and others		1	1
Greenſhields	Edinburgh, Magiſtrates of,		6	12
Habkin	Hog		36	147
Haldane	Advocates, Dean and Faculty, and Clerks of Seſſion		95	422
Haldane	Anſtruther (Sir Robert) and others		134	601
Hamilton	Cardroſs (Lady)		12	37
Hamilton	Glaſgow, Univerſity of,		40	172
Hamiltons	Boſwell		44	192
Do.	Do.		78	346
Hamilton (Ducheſs Dowager of)	Hamilton (Duke of) and Gillies		100	443
Do.	Hamilton (Duke of)		135	604
Hamilton	Hamilton and others		111	493
Heriot's Hoſpital	Hepburn		30	118
Home (Sir Patrick)	Home (Sir Robert)		15	47
Home (Sir Robert)	Home (Sir Patrick)		28	105
Houſton (Dame Margaret)	Schaw (Sir John)		128	561
Kennedy (Sir Andrew)	Cuming (Sir Alexander)		8	19
Kennedies	Macdowall		110	488
Kinnaird (Lord and Lady)	Riddoch and Lyon		5	11
Lockhart	Cheiſly and others		22	80
Lovat (Lord)	Mackenzie and others		53	241
Do.	Lovat (Dowager Lady) and others		80	355
Do.	Mackenzie		101	449
Do.	Royſton (Lord) and others		136	607

Appellants.	Reſpondents.	Num.	Page
Lyon	Aboyne (Earl of)	37	154
M'Culloch	M'Culloch	137	611
Mackenzie and others	Mackilligins	96	431
Macphetſon	Macpherſon	97	435
Maxwells	Sharp	85	380
Maxwell (Sir Alexander)	Houſton	124	539
Menzies	Menzies's and Muir	34	139
Middleton	Balfour	39	167
Middleton	Chalmers	87	391
Mill and others	Reid and others	102	452
Moniepenny	Brown	9	26
Moriſon	Scott (Sir Wm.) and others	58	269
Moriſon	Smith and Burton	54	259
Muirhead	Muirhead	2	4
Munro	Bruce	86	387
Munro and Macneil	Mackenzie and others	108	477
Murray	Murray	35	144
Murray	Bullerwell	98	436
Murray	Butler and others	105	465
Napier	Napier App.	29	619
Neilſon	Murray	125	547
Niſbet	Niſbet and others	133	594
Paterſon	Forfeited Eſtates, Commiſſioners of	79	349
Paterſon	Ogilvie and Murray	112	499
Paterſon	Cockburn	113	503
Porteous	Fordyce and Scott	42	183
Rigge	Abercrombie	99	438
Robertſon	Robertſon	16	55
Robertſon	Kinnoul (Earl of)	63	257
Do.	Do.	88	394
Ruſſell	Cochran	23	84
St. Ninians (Heritors of)	Stirling, Preſbytery of,	19	65
Saltoun (Lord)	Fraſer	68	312
Schaw (Sir John)	Houſton (Dame Margaret and Sir John)	46	213
Do.	Houſton (Dame Margaret)	126	552
Scott	Montroſe, Magiſtrates of,	26	96
Scott of Raeburn	Scott of Harden	51	226
Sempill (Lady)	Murray	62	282
Sinclair (Sir James)	Sinclair	17	59
Stevenſon and Gillon	Fifes	49	215
Stirling	Gray	132	590
Sutherland (Earl of) and Roſs	Dunbar and others	122	531
Tham	Sheriffs	123	534
Walker	Forreſter and Macpherſon	91	405
Wallace	Hope (Sir Alexander)	25	91
Watſon	Watſon	33	134
York Buildings Company	Haldane	120	521

INDEX

OF THE

RESPONDENTS' AND APPELLANTS' NAMES

IN

THIS VOLUME.

Respondents.	Appellants.	Num.	Page
ABERCROMBIE	Rigge	99	438
Aberdeen Preſbytery and Abercromby	Cuming (Sir Alexander)	81	364
Aberdeen, King's College and Magiſtrates of,	Falconer	89	397
Aboyne (Earl of)	Lyon	37	154
Advocates, Dean and Faculty, and Clerks of Seſſion	Haldane	95	428
Anderſon	Gregory	41	178
Annandale (Marquis of)	Annandale (Marchioneſs Dowager of)	93	411
Do.	Do. and her Sons	94	417
Do. and others	Annandale (Marchioneſs Dowager of)	106	467
Anſtruther (Sir Robert) and others	Haldane	134	602
Baine	Forfeited Eſtates, Commiſſioners of, App.	12	618
Balfour	Middleton	39	167
Balfour	Forfeited Eſtates, Commiſſioners of, App.	9	617
Bargany (Lord) and others	Do. do.	10	.—
Blantyre (Lord)	Cochrane	127	558
Boſwell	Hamiltons	44	192
Do.	Do.	78	346
Brodie	Gordon (Sir Robert)	56	259
Brown	Moniepenny	9	26
Bruce	Munro	86	387
Buchan (Earl of)	Duff and others	121	525
Bullerwell	Murray	98	436
Butler and others	Murray	105	465

Respondents.	Appellants.	Num.	Page
Caithneſs (Earl of)	Breadalbane (Earl of) and others	104	459
Callander	Gray (Dame Eſther)	109	483
Cardroſs (Lady)	Hamilton	12	37
Caſſie	Forfeited Eſtates, Commiſſioners of, App.	3	617
Chalmers	Middleton	87	391
Cheiſly and others	Lockhart	22	80
Cockburn (sir William) and Hamilton (Sir George)	Fairholm	69	317
Cockburn	Paterſon	113	503
Cochran	Ruſſell	23	84
Colvill, or Ayton (Dame Margaret)	Ayton	50	221
Craigengelt	Forfeited Eſtates, Commiſſioners of, App.	24	618
Crawfurd	Crawfurd	10	28
Cuming (Sir Alexander)	Kennedy (Sir Andrew)	8	19
Cuming (Sir Alexander)	Brand	115	511
Currie	Blantyre (Lord) and Seaton (George)	24	88
Don (Sir Alexander)	Don	21	76
Drummond	Forfeited Eſtates, Commiſſioners of,	64	290
Dunbar and others	Sutherland (Earl of) and others	122	531
Dundonald (Earl of)	Clydeſdale (Marquis of)	129	564
Edinburgh, Magiſtrates of,	Greenſhields	6	12
Do. and Candlemakers of,	Edinburgh, Butchers of,	31	124
Elgin, Miniſters of, and others	Elgin, Magiſtrates of,	20	69
Erſkine	Dunbar	14	43
Erſkine	Forfeited Eſtates, Commiſſioners of,	82	368
Erſkine	Do. App.	1	617
Erſkine	Do. do.	5	—
Falconer (Dame Elizabeth) and others	Falconer	84	377
Farquharſon	Forfeited Eſtates, Commiſſioners of,	74	340
Ferguſon	Cuming (Sir Alexander)	130	577
Fifes	Stevenſon and Gillon	49	216
Forbes	Forbes	13	41
Forbes	Forfeited Eſtates, Commiſſioners of, App.	19	618
Fordyce and Scott	Porteous	42	183
Forfeited Eſtates, Commiſſioners of,	Paterſon	79	349
Do.	Bayne	114	507
Forreſter and Macpherſon	Walker	91	405
Fraſer	Saltoun (Lord)	68	312
Glaſgow, Univerſity of,	Hamilton	40	172
Gordon	Forfeited Eſtates, Commiſſioners of,	60	278

Reſpondents.	Appellants.	Num.	Page
Gordon	Duff	83	372
Gordon	Forfeited Eſtates, Commiſſioners of, App.	16	618
Gordon	Do. do.	21	—
Gray	Stirling	132	590
Grierſon	Forfeited Eſtates, Commiſſioners of,	65	298
Haldane	York Buildings Company	120	521
Hamilton (Duke of) and others	Gray (Sir James)	1	1
Do.	Forfeited Eſtates, Commiſſioners of,	59	274
Do. and Gillies	Hamilton (Ducheſs Dowager of)	100	443
Do.	Do.	135	604
Hamilton	Cockburn	11	32
Do.	Do.	18	61
Hamilton	Cuninghame	43	187
Hamilton	Blackwood	48	211
Hamilton and others	Hamilton	111	493
Hamilton (Lady Mary)	Forfeited Eſtates, Commiſſioners of, App.	23	618
Hepburn	Heriot's Hoſpital	30	118
Hog	Habkin	36	147
Hog	Forfeited Eſtates, Commiſſioners of,	75	341
Home (Sir Robert)	Home (Sir Patrick)	15	47
Home (Sir Patrick)	Home (Sir Robert)	28	105
Home (Earl and Counteſs Dowager of)	Forfeited Eſtates, Commiſſioners of, App.	17	618
Hope (Sir Alexander)	Wallace	25	91
Houſton (Dame Margaret, and Sir John)	Schaw (Sir John)	46	203
Houſton (Dame Margaret)	Do.	126	552
Houſton	Maxwell (Sir Alexander)	124	539
Hyndford (Earl of)	Charteris	107	471
Innes and Donaldſon	Abercromby and others	103	457
Kennedy (Sir T.) and others	Brand (Sir Alexander)	4	8
Kinnoul (Earl of)	Robertſon	63	287
Do.	Do.	88	394
Do. and Drummond	Forfeited Eſtates, Commiſſioners of, App.	6	617
Lockhart	Do. 116, 117,	118	514
Lovat (Dowager Lady) and others	Lovat (Lord)	80	355
Loudoun (Earl of)	Farquhar	66	303
Lundine and others	Durham	7	16
M'Culloch	M'Culloch	137	611
Macdonald (Sir James)	Forfeited Eſtates, Commiſſioners of,	67	307
M'Donald and Stewart	Do. App.	13	618
Macdowall	Kennedies	110	488

Reſpondents.	Appellants.	Num.	Page
Mackenzie	Brand (Sir Alexander)	5	8
Mackenzie	Forfeited Eſtates, Commiſſioners of,	57	263
Do.	Do.	61	280
Mackenzie (Sir James)	Do.	72	335
Mackenzie	Do. App.	22	618
Mackenzie	Do. do.	26	619
Mackenzie and others	Lovat (Lord)	53	241
Mackenzie	Do.	101	449
Mackenzie and others	Munro and Macneil	108	477
Mackilligins	Mackenzie and others	96	431
Maclain	Forfeited Eſtates, Commiſſioners of, App.	28	619
Macpherſon	Macpherſon	97	435
Marchmont (Earl of)	Forfeited Eſtates, Commiſſioners of App.	14	618
Martin	Do. do.	25	—
Maule	Do. do.	18	—
Maxwell	Do. do.	4	617
Menzies's and Muir	Menzies	34	139
Montgomerie and others	Douglas's	27	99
Montroſe, Magiſtrates of,	Scott	26	96
Morton (Earl of)	Brown and Roſs	55	254
Muirhead	Muirhead	2	4
Murray	Murray	35	144
Murray	Sempill (Lady)	62	282
Murray	Neilſon	125	545
Muſhett and others	Falconer and others	29	110
Napier	Napier App.	29	619
Niſbet and others	Niſbet	133	594
Ogilvies	Forfeited Eſtates, Commiſſioners of,	71	331
Ogilvie and Murray	Paterſon	112	499
Pantoun	Cuming (Sir Alexander)	131	582
Pollock	Campbell	70	321
Preſton	Forfeited Eſtates, Commiſſioners of, App.	20	618
Reid and others	Mill and others	102	452
Riddoch and Lyon	Kinnaird (Lord and Lady)	5	11
Robertſon	Robertſon	16	55
Royſton (Lord) and others	Lovat (Lord)	136	607
Ruglen (Earl of)	Forfeited Eſtates, Commiſſioners of, App.	27	619
Sandilands	Fraſer (Sir Peter)	47	209
Schaw (Sir John)	Houſton (Dame Margaret)	128	561
Scott of Harden	Scott of Raeburn	51	229
Scott (Sir Wm.) and others	Moriſon	58	265
Scrimſeour	Forfeited Eſtates, Commiſſioners of, App.	15	618
Sharp	Maxwells	85	380
Sheriffs	Tham	123	534
Sinclair	Sinclair (Sir James)	17	69
Smart	Allardice	90	399

Reſpondents.	Appellants.		Num.	Page
Smith and Burton	Moriſon		54	249
Stevenſon	Forfeited Eſtates, Commiſſioners of,		119	518
Stewart and others	Collier		32	130
Do. (Sir George)	Forfeited Eſtates, Commiſſioners of,		73	337
Do.	Do.		76	342
Do.	Do.		77	345
Stewart (Sir James)	Do.	App.	8	617
Stirling (Preſbytery of)	St. Ninians, Heritors of,		19	65
Stirling	Forfeited Eſtates, Commiſſioners of,	App.	2	617
Swinton (Sir John)	Goddard		38	162
Threipland	Forfeited Eſtates, Commiſſioners of,	App.	7	617
Wallace	Do.	do.	11	618
Watſon	Watſon		33	134
Watſon	Baſkett and others		45	197
Wilſon	Arratt		52	234
Do.	Do.		92	409

END OF THE FIRST VOLUME.

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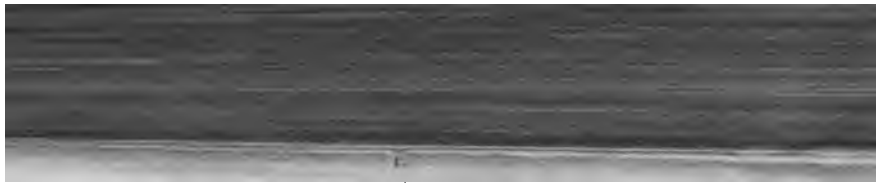
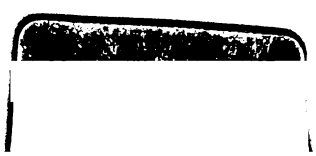
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